

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

Page 1

THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

JAMES R. GLIDEWELL DENTAL CERAMICS, )  
INC., DBA GLIDEWELL LABORATORIES, )  
)  
PLAINTIFF/COUNTER-DEFENDANT, )CASE NO.  
)SACV11-01309-DOC  
v. ) (ANx)  
)  
KEATING DENTAL ARTS, INC., )  
)  
DEFENDANT/COUNTER-PLAINTIFF. )  
\_\_\_\_\_ )

VIDEOTAPED DEPOSITION OF DAVID J. FRANKLYN  
TAKEN FRIDAY, OCTOBER 12, 2012  
IRVINE, CALIFORNIA

Reported by Audra E. Cramer, CSR No. 9901

\_\_\_\_\_  
DIGITAL EVIDENCE GROUP  
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Washington, DC 20036  
(202) 232-0646

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 VIDEOTAPED DEPOSITION OF DAVID J. FRANKLYN, TAKEN ON</p> <p>2 BEHALF OF THE DEFENDANT/COUNTER-PLAINTIFF, AT 9:40 A.M.</p> <p>3 FRIDAY, OCTOBER 12, 2012, AT 2040 MAIN STREET, IRVINE,</p> <p>4 CALIFORNIA, BEFORE AUDRA E. CRAMER, CSR NO. 9901,</p> <p>5 PURSUANT TO NOTICE.</p> <p>6</p> <p>7 APPEARANCES OF COUNSEL</p> <p>8 FOR PLAINTIFF/COUNTER-DEFENDANT:</p> <p>9 LEONARD TACHNER PLC</p> <p>10 BY: LEONARD TACHNER, ESQUIRE</p> <p>11 17961 SKY PARK CIRCLE</p> <p>12 SUITE 38-E</p> <p>13 IRVINE, CALIFORNIA 92614-6364</p> <p>14 (949) 752-8525</p> <p>15 ltachner@aol.com</p> <p>16</p> <p>17 FOR DEFENDANT/COUNTER-PLAINTIFF:</p> <p>18 KNOBBE MARTENS OLSON &amp; BEAR LLP</p> <p>19 BY: LYNDA ZADRA-SYMES, ESQUIRE</p> <p>20 RUSTIN MANGUM, ESQUIRE</p> <p>21 2040 MAIN STREET</p> <p>22 14TH FLOOR</p> <p>IRVINE, CALIFORNIA 92614</p> <p>(949) 760-0404</p> <p>ljs@kmob.com</p> <p>rustin.mangum@kmob.com</p> <p>ALSO PRESENT:</p> <p>CHUCK GOSWITZ, VIDEOGRAPHER</p> <p>Page 2</p>	<p>1 EXHIBITS (CONTINUED)</p> <p>2 NO. PAGE DESCRIPTION</p> <p>3 Exhibit 80 109 ARTICLE FROM INTERNATIONAL</p> <p>4 JOURNAL OF BEHAVIORAL</p> <p>5 MEDICINE KDA-001648 THRU</p> <p>6 652</p> <p>7 Exhibit 81 111 EXCERPT FROM JOURNAL OF</p> <p>8 OROFACIAL PAIN KDA-002048</p> <p>9 THRU KDA-002062</p> <p>10 Exhibit 82 112 BRUXISM ARTICLE KDA-001657</p> <p>11 THRU 001661</p> <p>12 Exhibit 83 113 BRUXISM ARTICLE KDA-001738</p> <p>13 THRU 742</p> <p>14 Exhibit 84 114 KDA-002078 THRU 086</p> <p>15 Exhibit 46 116 MINNESOTA R FORM KDA-002832</p> <p>16 THRU 833</p> <p>17 Exhibit 85 117 WEB ARTICLE "THE METAL-FREE</p> <p>18 PRACTICE SCAM"</p> <p>19 Exhibit 86 121 TWO-PAGE WEB PRINTOUT</p> <p>20 "PROVEN WINNERS"</p> <p>21 Exhibit 87 122 THREE-PAGE WEB PRINTOUT</p> <p>22 "ASK DR. CHRISTENSEN"</p> <p>Exhibit 88 136 ONE-PAGE PRINTOUT "ZIRA</p> <p>FULL-CONTOUR ZIRCONIA"</p> <p>Exhibit 89 139 TWO-PAGE TESS PRINTOUT</p> <p>"SUNTECH FULL ZIRCONIA"</p> <p>Exhibit 90 147 TWO-PAGE "ZERISBRUX"</p> <p>AD/PRINTOUT</p> <p>Exhibit 91 147 METAL-FREE RESTORATION</p> <p>GUIDE KDA-002172 THRU 173</p> <p>Page 4</p>
<p>1 I N D E X</p> <p>2 WITNESS</p> <p>3 DAVID J. FRANKLYN</p> <p>4</p> <p>5 EXAMINATION PAGE</p> <p>6 MS. ZADRA-SYMES 6</p> <p>7 (P.M. SESSION) 104</p> <p>8</p> <p>9 E X H I B I T S</p> <p>10 NO. PAGE DESCRIPTION</p> <p>11 Exhibit 71 7 CV OF DAVID J. FRANKLYN</p> <p>12 Exhibit 15 35 BRUXZIR/GLIDEWELL LAB COLOR</p> <p>13 BROCHURE</p> <p>14 Exhibit 72 41 EXPERT REPORT OF DAVID J.</p> <p>15 FRANKLYN</p> <p>16 Exhibit 73 61 TWO-PAGE WEB PRINTOUT FOR</p> <p>17 BRUXER CROWN</p> <p>18 Exhibit 74 61 TWO-PAGE WEB PRINTOUT FOR</p> <p>19 BRUXER CROWN</p> <p>20 Exhibit 75 77 BRUXER DOC KDA-002445</p> <p>21 Exhibit 76 79 DOCUMENT KDA-002444 AND</p> <p>22 DOCUMENT KDA-002799 THRU</p> <p>KDA-002800</p> <p>Exhibit 77 91 TWO-PAGE CROWN AND BRIDGE</p> <p>WEB PRINTOUT</p> <p>Exhibit 78 104 EXCERPT FROM JOURNAL OF</p> <p>ORAL REHABILITATION</p> <p>KDA-002152 THRU 160</p> <p>Exhibit 79 107 CRANIO ARTICLE FROM OCTOBER</p> <p>1999 KDA-002106 THRU 118</p> <p>Page 3</p>	<p>1 IRVINE, CALIFORNIA;</p> <p>2 FRIDAY, OCTOBER 12, 2012, 9:40 a.m.</p> <p>3</p> <p>4 THE VIDEOGRAPHER: Good morning. This is Tape</p> <p>5 No. 1 of the videotaped deposition of David Franklyn,</p> <p>6 taken by Defendants in the matter of James R. Glidewell</p> <p>7 Dental Ceramics, Inc. v. Keating Dental Arts, Inc., in</p> <p>8 the United States District Court for the Central</p> <p>9 District of California, Southern Division, Case</p> <p>10 No. SACV11-01309-DOC.</p> <p>11 This deposition is being held at 2040 Main</p> <p>12 Street, 14th Floor, in Irvine, California. Today's date</p> <p>13 is Friday, October 12, 2012. The time on the video</p> <p>14 screen is 9:40 a.m.</p> <p>15 My name is Chuck Goswitz. The court reporter</p> <p>16 is Audra Cramer. We are both with Digital Evidence</p> <p>17 Group.</p> <p>18 Will counsel please introduce themselves for</p> <p>19 the record.</p> <p>20 MS. ZADRA-SYMES: Linda Zadra-Symes and</p> <p>21 Rustin Mangum for the Defendant Keating Dental Arts.</p> <p>22 MR. TACHNER: Leonard Tachner for the Plaintiff</p> <p>Page 5</p>

Pages 2 to 5

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 Glidewell Laboratories.  
2 THE VIDEOGRAPHER: Thank you.  
3 Will the court reporter please swear in the  
4 witness.  
5  
6 DAVID J. FRANKLYN,  
7 having been first duly sworn, was  
8 examined and testified as follows:  
9  
10 EXAMINATION  
11 BY MS. ZADRA-SYMES:  
12 Q. Good morning.  
13 A. Good morning.  
14 Q. The first question I have for you is, have you  
15 ever been deposed before?  
16 A. I have.  
17 Q. How many times?  
18 A. More than 10, less than 20. Probably 12,  
19 14 times, something like that.  
20 Q. Okay. I don't believe you listed 10  
21 depositions in your resume.  
22 A. I can supplement it for you.

Page 6

1 Q. Okay. So let's start with that then. So which  
2 cases have you testified in?  
3 A. Well, do you have an extra copy of my CV that I  
4 could look at?  
5 Q. Yeah.  
6 A. Thank you.  
7 MS. ZADRA-SYMES: Oh, I marked on the one --  
8 THE WITNESS: Shall we switch?  
9 MS. ZADRA-SYMES: Yeah, actually, can I take  
10 this off and stick it on this one?  
11 I just handed you what the court reporter has  
12 marked as Exhibit 71.  
13 (Whereupon, Exhibit 71 was marked  
14 for identification.)  
15 THE WITNESS: Yes, okay. Going through, if you  
16 look at my page 2 and page 3 of my CV, there's a  
17 representative list of clients, and I believe all or  
18 most of the cases in which I've testified either by  
19 deposition or trial would be listed here. So let's just  
20 go through those, and I'll give you an indication.  
21 Would that be okay?  
22 BY MS. ZADRA-SYMES:

Page 7

1 Q. That would be great.  
2 A. Okay. In the Herbalife case, the fifth one  
3 down, I was deposed. In the Allergan case I was  
4 deposed. In the Belvedere vodka case I was deposed.  
5 Going to the next page, ION Media Networks, I  
6 believe I was deposed. Hard Rock Cafe case I was  
7 deposed. Dioptics Medical Products I was deposed.  
8 Bad Boy case I was deposed. The Cuties case, which is  
9 near the end, the Roll group, I was deposed and  
10 testified in arbitration.  
11 And I think that's it. How many does that come  
12 to?  
13 MR. TACHNER: Eight.  
14 MS. ZADRA-SYMES: Eight.  
15 THE WITNESS: Okay.  
16 BY MS. ZADRA-SYMES:  
17 Q. So other than that one arbitration, have you  
18 ever testified at trial?  
19 A. No.  
20 Q. What was the nature of your representation for  
21 King of Thai noodles?  
22 A. Worked on trademark licensing agreements.

Page 8

1 Q. So these are not all expert witness clients?  
2 A. Correct. Some are consulting clients.  
3 Q. Do you understand that you are here today in  
4 connection with cases pending in the Central District of  
5 California?  
6 A. I do.  
7 Q. And you have actually prepared a report in  
8 connection that case; is that correct?  
9 A. I have.  
10 Q. Who have you spoken with at Glidewell  
11 Laboratories regarding your report?  
12 A. Mr. Jim Shuck.  
13 Q. Anybody else?  
14 A. No.  
15 Q. Have you discussed your report with any  
16 dentists?  
17 A. No.  
18 Q. Have you discussed any research for your report  
19 with any dentists?  
20 A. No.  
21 Q. Have you discussed any research for your report  
22 with any dental labs?

Page 9

Pages 6 to 9

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 A. No.</p> <p>2 Q. Turning to your resume, Exhibit 71, your</p> <p>3 undergraduate degree was obtained in what year?</p> <p>4 A. 1983.</p> <p>5 Q. And what was the undergraduate degree in?</p> <p>6 A. Philosophy, religion and history.</p> <p>7 Q. Do you have any science education?</p> <p>8 A. No -- well, I took some classes.</p> <p>9 Q. In the undergraduate degree?</p> <p>10 A. Yeah.</p> <p>11 Q. And what subjects would those be?</p> <p>12 A. I don't recall exactly. You're talking about</p> <p>13 1979 to 1983. But as part of the two-year general</p> <p>14 requirements, there was some science and some math, yes.</p> <p>15 Q. Okay. So any science education since that</p> <p>16 time?</p> <p>17 A. No.</p> <p>18 Q. Then you obtained your law degree from the</p> <p>19 University of Michigan in 1990.</p> <p>20 A. Yes.</p> <p>21 Q. Did you work at all between 1983 and 1990?</p> <p>22 A. Yes.</p> <p>Page 10</p>	<p>1 industry?</p> <p>2 A. Prior to this case, no.</p> <p>3 Q. And everything you have read is listed in your</p> <p>4 report?</p> <p>5 A. I believe so.</p> <p>6 Q. Have you ever been deposed in a case that</p> <p>7 involves the dental industry?</p> <p>8 A. I don't think so. No.</p> <p>9 Q. Have you ever been a consultant for a client in</p> <p>10 the dental industry?</p> <p>11 A. No.</p> <p>12 Q. Have you ever acted as legal counsel for a</p> <p>13 client in the dental industry?</p> <p>14 A. No.</p> <p>15 Q. So I take it, then, you've never filed a</p> <p>16 trademark for a client in the dental industry?</p> <p>17 A. Correct.</p> <p>18 Q. How many trademarks have you filed in the last</p> <p>19 10 years?</p> <p>20 A. I don't file trademarks, but I've consulted</p> <p>21 with companies in proceedings before the PTO.</p> <p>22 Q. And what do you mean by that?</p> <p>Page 12</p>
<p>1 Q. And what type of work did you have --</p> <p>2 A. I was a high school teacher educating students</p> <p>3 at a Catholic high school in Los Angeles.</p> <p>4 Q. And what did you teach?</p> <p>5 A. History and literature.</p> <p>6 Q. Have you ever taught any science classes?</p> <p>7 A. No.</p> <p>8 Q. Have you ever written any articles in</p> <p>9 connection with a science subject?</p> <p>10 A. No.</p> <p>11 Q. Have you ever written any articles focused on</p> <p>12 the dental industry?</p> <p>13 A. No.</p> <p>14 Q. Have you ever read any articles focused on the</p> <p>15 dental industry?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. What have you read?</p> <p>18 A. Well, the articles that are listed in my</p> <p>19 report. I'd have to look at my report. In preparation</p> <p>20 for here.</p> <p>21 Q. So other than what's listed in your report,</p> <p>22 you've never read any articles related to the dental</p> <p>Page 11</p>	<p>1 A. Well, I've consulted with companies in</p> <p>2 selection of marks and also in office actions and how to</p> <p>3 respond to office actions. I've consulted with clients</p> <p>4 with inter partes proceedings. I have a client now that</p> <p>5 has finished an inter partes proceeding in the PTO</p> <p>6 involving genericism, and I've consulted with them</p> <p>7 extensively. And other priority issues, other issues</p> <p>8 related to oppositions and cancellations.</p> <p>9 Q. And you mentioned one case. I assume by</p> <p>10 "inter partes in the PTO," you mean an opposition or</p> <p>11 cancellation for the trademark --</p> <p>12 A. An opposition, trial and appeal board.</p> <p>13 I'm sorry. I'll --</p> <p>14 Q. But it's an opposition --</p> <p>15 A. -- wait till you finish.</p> <p>16 Q. It's an opposition before the --</p> <p>17 A. Yes.</p> <p>18 Q. -- trademark trial and appeal board?</p> <p>19 A. Uh-huh.</p> <p>20 Q. What's the name of the mark?</p> <p>21 A. Paveway, P-a-v-e-w-a-y.</p> <p>22 Q. And who is your client in that case?</p> <p>Page 13</p>

Pages 10 to 13

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 A. Raytheon.  
2 Q. Have you consulted with any other clients  
3 involving genericness in the trademark trial and appeal  
4 board?  
5 A. Let me look.  
6 It came up in a case against Google wherein  
7 somebody was alleging that "Google" had become generic  
8 because people say, "I'm going to Google somebody," even  
9 if they mean on Yahoo.  
10 Q. So which case was that?  
11 A. That was -- I'm trying to see if it's on here  
12 or if the client's on here. I'll have to go back and  
13 look and see if it's on here. There is a case, Silvers,  
14 against Google, but I don't think it came up in that  
15 case. It came up in a different case where the  
16 plaintiff's mark was googlegear.com.  
17 Q. Who was your client in that case?  
18 A. googlegear.com.  
19 Other than that, I'm just looking at these to  
20 see if any of these involved genericness either at the  
21 PTO or in litigation. I'd have to kind of go -- well,  
22 Botox. Botox' mark was claimed to be generic. I gave  
Page 14

1 some consulting advice on that.  
2 Q. Who was your client in that case?  
3 A. The owner of the Botox mark, Allergan.  
4 The Maui pineapple case involved a genericness  
5 issue for a particular subtype of pineapple that they  
6 had developed that was called Hawaiian Gold, and  
7 somebody else was calling the pineapple Hawaii Gold, and  
8 there was an argument that "Hawaiian Gold" was generic  
9 for a genetically bred, new type of pineapple.  
10 Let's see what else here. I think -- let's  
11 see.  
12 Pizza Man might have involved a claim of  
13 genericness. I'd have to go back and look and see.  
14 Well, the cookie at issue in the Big Island  
15 Candies case was alleged to be a generic shape of a  
16 shortbread cookie and implied generic trade dress.  
17 Q. Who was your client in that case?  
18 A. Big Island Candies, as I recall.  
19 Gerawan Farms, the very last case on the list,  
20 is a case in which there has been significant litigation  
21 over whether Prima as a brand for fruit, certain kinds  
22 of peaches, genetically modified, is generic by virtue  
Page 15

1 of the fact that the patent lawyers who got the plant  
2 patents used, at least on some occasions, the client's  
3 mark, Prima, as a varietal name in the plant patent  
4 applications. The argument was made -- when they went  
5 and sued somebody, the defendant said, "Well, your mark  
6 is generic," and that was litigated.  
7 Q. Where was that litigated?  
8 A. I think in the -- well, I got involved in the  
9 case after that, but the underlying genericness issue  
10 was litigated, I think, in the Central District in  
11 federal court here in California.  
12 Q. And who was your client in that case?  
13 A. My client is still, as we speak, Gerawan Farms,  
14 who's listed here, who's the owner of the Prima mark.  
15 I'm just looking through here to see if any of  
16 these other ones involved genericness.  
17 Well, as I sit here today, that's my best  
18 recollection of the cases that I've been involved in  
19 that have involved -- that have included a genericness  
20 issue.  
21 Q. Okay. So the Herbalife case that you were  
22 deposed in, what was the issue in that case?  
Page 16

1 A. The issue in that case was whether Herbalife  
2 was -- well, there were a lot of issues. But Herbalife  
3 was in litigation with Adidas over the use of the  
4 three-leaf Herbalife logo, which Adidas alleged was  
5 confusingly similar to its three-leaf logo. The parties  
6 had had a contract, and at one point in time they agreed  
7 to sort of stay out of each other's territory, products  
8 and services types.  
9 Then subsequent to that, Herbalife became the  
10 sponsor for the L.A. Galaxy soccer team, and in  
11 conjunction with that, its three-leaf logo was at some  
12 point displayed on the chests of the soccer players as  
13 they were running around. Adidas said that violates the  
14 contract, and -- so that's like Count 1 of the  
15 complaint, and Count 2 is you're causing a likelihood of  
16 confusion. People are going to think that it's ours.  
17 Q. Where was that case pending?  
18 A. It was here in Los Angeles, federal court.  
19 Q. And then the Belvedere vodka case you were  
20 deposed in?  
21 A. Yes?  
22 Q. What was the main issue in that case?  
Page 17

Pages 14 to 17

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 A. That case is still going on right now. The</p> <p>2 main issue is whether Reed Smith in New York, trademark</p> <p>3 lawyers, committed malpractice in a variety of advice --</p> <p>4 pieces of advice that they gave to the then licensee of</p> <p>5 the Belvedere vodka trademark during a time when it was</p> <p>6 being purchased -- the license was being purchased by</p> <p>7 Moët Hennessy in Paris.</p> <p>8 The advice had to do -- without violating any</p> <p>9 sort of confidentiality issues -- with whether they</p> <p>10 could get out of the license or they could challenge the</p> <p>11 attempt by the licensor, which was a winery in Napa</p> <p>12 which had prior rights in the Belvedere mark for wine --</p> <p>13 whether they could challenge the attempted licensing of</p> <p>14 it in a collateral market for gin. And a series of</p> <p>15 events took place which ended up costing the parties</p> <p>16 a lot of money because of the advice that was given.</p> <p>17 Q. And that's pending in Central District of</p> <p>18 California.</p> <p>19 A. No. That case, the Belvedere vodka case, is in</p> <p>20 state court in New York City, I believe, yeah.</p> <p>21 Q. And then you mentioned that you were deposed in</p> <p>22 ION Media Networks.</p> <p style="text-align: right;">Page 18</p>	<p>1 overstated their description of goods and services.</p> <p>2 There were a lot of issues, but trademark -- there</p> <p>3 was -- I do not believe there was a genericness issue in</p> <p>4 that case.</p> <p>5 Q. Okay. And then you mentioned you were deposed</p> <p>6 in Hard Rock Cafe. Where was that case pending?</p> <p>7 A. That case was pending here in state court in</p> <p>8 Los Angeles.</p> <p>9 Q. And did that involve a trademark genericness or</p> <p>10 likelihood of confusion issue?</p> <p>11 A. No, I don't think so.</p> <p>12 Q. Then you mentioned you were deposed in Dioptri;</p> <p>13 is that right? CS Medical Products.</p> <p>14 A. Dioptric.</p> <p>15 Q. Dioptric.</p> <p>16 A. Dioptrics.</p> <p>17 Q. Medical products.</p> <p>18 A. Yes. That -- I think that was in the Northern</p> <p>19 District of California, uh-huh. I'd have to go back and</p> <p>20 look. That's 10 years ago. I know I was deposed in</p> <p>21 San Francisco, but I'm forgetting -- and it was in</p> <p>22 federal court, either down here or up there. I just</p> <p style="text-align: right;">Page 20</p>
<p>1 A. Yes.</p> <p>2 Q. Where was that case pending?</p> <p>3 A. That was here in Los Angeles in federal court.</p> <p>4 That was a case involving the trademark ION, I-O-N, and</p> <p>5 it was -- I was an expert for the defendant ION Media</p> <p>6 Networks, which I believe now is out of business, but it</p> <p>7 was a rather large cable television company. They were</p> <p>8 sued by a small company that had prior rights in the</p> <p>9 word "ion" in a registered trademark for online</p> <p>10 magazines, and they had a bit of a website where you</p> <p>11 could get some information about a variety of things.</p> <p>12 Honestly, it was a linking farm, but one of the</p> <p>13 things they said they were going to do is stream</p> <p>14 television online. So that was the allegation, that</p> <p>15 there was confusion because ION Media Networks, an</p> <p>16 offline company, was related to television.</p> <p>17 Q. So the main trademark issue was likelihood of</p> <p>18 confusion?</p> <p>19 A. It was likelihood of confusion. It was -- I</p> <p>20 think there was some priority issues. There were issues</p> <p>21 having to do with the scope of Positive Ions' federal</p> <p>22 registration for the word "ion," whether they had</p> <p style="text-align: right;">Page 19</p>	<p>1 don't recall.</p> <p>2 Q. Do you recall whether it involved a genericness</p> <p>3 issue?</p> <p>4 A. No, it involved likelihood of confusion over</p> <p>5 the mark -- oh, hang on a second -- Encor, E-n-c-o-r,</p> <p>6 for either -- one party had it for sort of post-cataract</p> <p>7 surgery sunglasses, and the other party was using it for</p> <p>8 contact lenses, and there were issues about the strength</p> <p>9 of the mark and about confusion and about whether the</p> <p>10 markets were overlapping between the parties, marketing</p> <p>11 channels.</p> <p>12 Q. Okay. The next case you mentioned is Bad Boy,</p> <p>13 Inc., that you were deposed in.</p> <p>14 A. Yes.</p> <p>15 Q. And where was that case pending?</p> <p>16 A. Southern District of Florida, I believe.</p> <p>17 Q. Was the issue of genericness involved in that</p> <p>18 case?</p> <p>19 A. Oh, goodness. I'd have to go back and look.</p> <p>20 The mark is Bad Boy for clothing and for power drinks,</p> <p>21 and there were issues regarding the validity of the</p> <p>22 mark, the plaintiff's mark, but I don't believe that the</p> <p style="text-align: right;">Page 21</p>

Pages 18 to 21



10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 validity issues turned on genericness.</p> <p>2 Q. And who was your client, plaintiff or</p> <p>3 defendant?</p> <p>4 A. I was in that case working for the plaintiff.</p> <p>5 Q. The next one you mentioned you testified in is</p> <p>6 the Roll group.</p> <p>7 A. Yes.</p> <p>8 Q. And where was that case pending?</p> <p>9 A. This arbitration was --</p> <p>10 Q. I'm sorry. Arbitration.</p> <p>11 A. -- was this summer in Bakersfield, California.</p> <p>12 I think it was -- I testified in June of this year in</p> <p>13 Bakersfield. I was deposed probably in May. Might be</p> <p>14 off by a few weeks either way, but, you know, late</p> <p>15 spring, early summer.</p> <p>16 Q. Okay. And was the issue of genericness</p> <p>17 discussed in that case?</p> <p>18 A. Yes.</p> <p>19 Q. Who was your client, the plaintiff or</p> <p>20 defendant?</p> <p>21 A. Well, they had so cross-sued each other for</p> <p>22 everything, they were both plaintiffs and both</p> <p style="text-align: right;">Page 22</p>	<p>1 A. I don't think I've published a specific article</p> <p>2 published on that. I've published many articles on</p> <p>3 trademark law. I've studied trademark genericness quite</p> <p>4 a bit. I don't think, if you look at my articles,</p> <p>5 either pending or published, any of them are focused</p> <p>6 primarily on the issue of genericness.</p> <p>7 Q. Have you published any articles on the issue of</p> <p>8 trademark likelihood of confusion?</p> <p>9 A. I have discussed likelihood of confusion in</p> <p>10 several of my articles.</p> <p>11 Q. Which ones are those?</p> <p>12 A. Let me see. I think -- you don't have on this</p> <p>13 resume -- on this CV the most recent one that is coming</p> <p>14 out, which talks about confusion quite a bit. Let me</p> <p>15 tell you that one and tell you how you can find it.</p> <p>16 It's called "Trademarks as Keywords: Much Ado</p> <p>17 About Something?" and it is forthcoming in the Harvard</p> <p>18 Journal of Law &amp; Technology in spring of 2013. It is</p> <p>19 posted on the Internet on the Social Science Research</p> <p>20 Network, SSRN. If you Google my name and that title,</p> <p>21 it'll come up within three or four hits, and you can</p> <p>22 read it and download it. And it discusses likelihood of</p> <p style="text-align: right;">Page 24</p>
<p>1 defendants, and I don't remember if -- my client was</p> <p>2 Paramount Citrus. The other party was Sun Pacific.</p> <p>3 Paramount Citrus is owned by the Roll group, which also</p> <p>4 owns a variety of other companies, such as Fiji water,</p> <p>5 and they're located here in the L.A. area. I just don't</p> <p>6 remember who initiated this particular arbitration,</p> <p>7 but -- yeah.</p> <p>8 And the arbitration is completely confidential</p> <p>9 and sealed, and so I have to be circumspect about how</p> <p>10 much I say about what's involved.</p> <p>11 Q. Okay. Were you representing the party</p> <p>12 asserting genericness?</p> <p>13 A. Neither party was asserting genericness, but</p> <p>14 genericness was an issue for which testimony was needed.</p> <p>15 Q. And that was the basis of your testimony?</p> <p>16 A. Well, my testimony covered many things.</p> <p>17 Q. Including genericness?</p> <p>18 A. Yes. But I really can't say more than that.</p> <p>19 It's not a public document. There's no public documents</p> <p>20 on that case.</p> <p>21 Q. Have you published any articles focused on the</p> <p>22 subject of trademark genericness?</p> <p style="text-align: right;">Page 23</p>	<p>1 confusion on trademarks on the Internet in some detail.</p> <p>2 Q. Is there a reason why it wasn't listed on your</p> <p>3 resume?</p> <p>4 A. Yes. Because at the time I gave this resume to</p> <p>5 counsel, it hadn't been accepted for publication. It</p> <p>6 was subsequently accepted for publication, and it is</p> <p>7 listed in a sense where I say, third article under</p> <p>8 Publications, "Empirical Study of Trademarks as</p> <p>9 Keywords: Confusion, Dilution and Diversion. Multiscale</p> <p>10 empirical research under way in Europe and U.S." Once</p> <p>11 it matured and became accepted, we changed the title,</p> <p>12 and that's why it's -- it's referenced here as a</p> <p>13 research study that was pretty mature, about ready to go</p> <p>14 out, but now it's a paper.</p> <p>15 Q. The title changed, basically.</p> <p>16 A. Yes, the title changed.</p> <p>17 Q. Have you reviewed Glidewell's marketing</p> <p>18 materials that have published. Not on their website,</p> <p>19 but their actual --</p> <p>20 A. I believe I have, yes.</p> <p>21 Q. Okay. We'll go through those.</p> <p>22 Do you know what a PFM is?</p> <p style="text-align: right;">Page 25</p>

Pages 22 to 25

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 A. Yes.  
2 Q. What is it?  
3 A. Give me one second. Okay?  
4 It is a porcelain-fused-to-metal crown.  
5 Q. Is that a generic term?  
6 A. I don't know.  
7 Q. Do you know what a full-cast gold crown is?  
8 A. I think it's what it sounds like: It's a  
9 full-cast gold crown.  
10 Q. Is that a generic term?  
11 A. I don't know. I haven't given that  
12 consideration. I would want to do an awful lot more  
13 looking into each of these before giving an opinion on  
14 one of these things.  
15 Q. Have you heard of an all-ceramic crown?  
16 A. I have, yes.  
17 Q. Is that a generic term?  
18 A. Yes.  
19 Q. Have you heard of a full zirconia crown?  
20 A. Yes.  
21 Q. Is that a generic term?  
22 A. Well, that's actually something that I've given  
Page 26

1 consideration to in this litigation, and I think it is,  
2 yes.  
3 Q. Is "full zirconia" a generic term?  
4 A. I don't know. It depends on what it's used  
5 for.  
6 Q. If it's used in connection with dental crowns,  
7 would it be generic?  
8 A. I don't know. I would have to look at it, the  
9 context and the way in which it's used.  
10 Q. If it's used in connection with dental crowns,  
11 to describe a dental crown, would it be generic?  
12 A. It could be, might be.  
13 Q. What is a dental crown?  
14 A. A dental crown is a piece of man-made material  
15 that is sculpted and shaped out of some type of  
16 substance, which different substances are used to put  
17 basically a cap on a tooth that has been injured in some  
18 way and to crown it so that it can be used as a  
19 functional tooth.  
20 Q. And how do you know that?  
21 A. Well, I know it from personal experience and  
22 from because I have one in my mouth that I got when I  
Page 27

1 bit down on a piece of nutshell in mole enchiladas in  
2 Birmingham, California, and my tooth cracked. My  
3 dentist said, "We're going to shave it down and put on a  
4 crown," and I think it's a zirconia crown. So I got to  
5 look at it and hold it -- and that was before this  
6 litigation -- and see it, and there was a temporary one  
7 put in place until the full one could be put in place.  
8 Then after that after, of course, when I got  
9 hired here, I started to have conversations with  
10 Attorney Tachner about the different types of crowns and  
11 educated myself, and to read on the Internet and educate  
12 myself, and talked to Mr. Shuck, I believe it is, and  
13 educated myself. So I have personal experience and then  
14 investigatorial experience about what a crown is.  
15 Q. When did you have your crown fitted?  
16 A. Two years ago? Year and a half ago?  
17 Q. Do you know who manufactured the crown?  
18 A. No.  
19 Q. Did your dentist tell who you manufactured it?  
20 A. No.  
21 Q. Do you know for a fact that it was a full  
22 zirconia crown?  
Page 28

1 A. I remember him using the word "zirconia."  
2 Q. Do you know if he used "full zirconia"?  
3 A. I'm not sure.  
4 Q. So you don't know for a fact whether you have a  
5 full zirconia crown or not.  
6 A. I do not.  
7 Can you tell by looking if we stop the tape for  
8 a minute?  
9 Q. No. I don't need to look.  
10 A. Okay.  
11 Q. So prior to this case, being retained in  
12 connection with this case by Glidewell, did you have any  
13 other experience with dental crowns other than your own  
14 personal experience?  
15 A. I think my father has dental crowns, my mother  
16 has dental crowns. Other than that kind of personal  
17 experience, no. No professional experience.  
18 Q. When you say that your mother and father having  
19 a dental crown is personal experience, do you know what  
20 type of dental crown they have?  
21 A. No.  
22 Q. You don't know whether they were fitted with  
Page 29

Pages 26 to 29



10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 zirconia crowns or not?</p> <p>2 A. I have never asked them. I will after today.</p> <p>3 Q. What's the primary indication for a zirconia</p> <p>4 crown?</p> <p>5 A. My understanding is that -- well, do you mean</p> <p>6 full zirconia crown?</p> <p>7 Q. Any zirconia crown.</p> <p>8 A. My understanding is that zirconia is an</p> <p>9 extra-strong material and that it should be used and is</p> <p>10 used when strength is particularly at issue. And there</p> <p>11 could be various reasons for that, why a patient might</p> <p>12 need a stronger crown than another patient.</p> <p>13 Q. And how do you know that?</p> <p>14 A. Speaking -- doing investigation in this case on</p> <p>15 the Internet, reading, reading the articles.</p> <p>16 Q. Everything that is referred to in your report?</p> <p>17 A. I believe it's all there. If -- now they can</p> <p>18 make a supplemental distribution to you.</p> <p>19 Q. Well, if there isn't anything referenced in</p> <p>20 your report, I'd like you to tell me what it is.</p> <p>21 A. I'd have to go back and look.</p> <p>22 Q. Okay. Well, we'll get to your report shortly.</p> <p style="text-align: right;">Page 30</p>	<p>1 prior to this case?</p> <p>2 A. No.</p> <p>3 Q. Had you had any contact with Glidewell's</p> <p>4 directors prior to this case?</p> <p>5 BY MS. ZADRA-SYMES:</p> <p>6 Q. You referenced full zirconia -- you asked me</p> <p>7 the question, actually, did I mean a zirconia crown or</p> <p>8 full zirconia crown.</p> <p>9 What's the difference, as far as you're aware,</p> <p>10 between a full zirconia crown and a regular zirconia</p> <p>11 crown.</p> <p>12 A. Well, it's my understanding that zirconia has</p> <p>13 been used or historically was used as part of a base for</p> <p>14 a crown prior to the development of the technology to</p> <p>15 the point where it could be used as a full zirconia</p> <p>16 crown. So a zirconia crown may have been used as a base</p> <p>17 at one point in time and then had an overlay of ceramic</p> <p>18 material for esthetic reasons, and I guess that would be</p> <p>19 not a full zirconia crown, a partial zirconia crown in</p> <p>20 terms of the makeup of the material.</p> <p>21 Q. Are you familiar with the term "all-zirconia</p> <p>22 crown"?</p> <p style="text-align: right;">Page 32</p>
<p>1 A. You're pointing at my CV, by the way. It's not</p> <p>2 my report.</p> <p>3 Q. Well, I will give you your report shortly.</p> <p>4 When did you first here the term "bruxer"?</p> <p>5 A. This case.</p> <p>6 Q. So prior to this case you'd never heard the</p> <p>7 term "bruxer"?</p> <p>8 A. I'd never heard -- well, I'm not sure if that's</p> <p>9 right actually. At one point I was told by my dentist,</p> <p>10 a few years ago, prior to the time I got this crown,</p> <p>11 that I was grinding my teeth my sleep. I don't recall</p> <p>12 if he used the term "bruxism" or "bruxer" at the time or</p> <p>13 if he just told me I was at that point a grinder.</p> <p>14 Q. But as far as you recollect, you had not heard</p> <p>15 the term --</p> <p>16 A. No.</p> <p>17 Q. -- "bruxer" before working on this case?</p> <p>18 A. That is correct.</p> <p>19 Q. Had you heard of the term "bruxism" before</p> <p>20 working on this case?</p> <p>21 A. No.</p> <p>22 Q. Have you ever had any contact with Glidewell</p> <p style="text-align: right;">Page 31</p>	<p>1 A. Yes.</p> <p>2 Q. How does that different from "full zirconia</p> <p>3 crown"?</p> <p>4 A. I'm not aware that it has a difference.</p> <p>5 Q. Does it differ from "full-contour zirconia</p> <p>6 crown"?</p> <p>7 A. I'm not aware that that has a difference in</p> <p>8 meaning either between "full zirconia" or "full-contour</p> <p>9 zirconia."</p> <p>10 Q. Okay. So as far as you're aware, "full-contour</p> <p>11 zirconia," "full zirconia" and "all-zirconia" are all</p> <p>12 synonym?</p> <p>13 A. That is my understanding.</p> <p>14 Q. Who are the primary market for full zirconia</p> <p>15 crowns?</p> <p>16 A. For the crown as the finished product or for</p> <p>17 the material that is used to make the crown?</p> <p>18 Q. Who does Glidewell sell its crowns too?</p> <p>19 A. My understanding is that Glidewell sells its</p> <p>20 crowns to dentists who order them, and it sells its</p> <p>21 blanks to labs that get orders from dentists.</p> <p>22 Q. I'm sorry. What did you call them?</p> <p style="text-align: right;">Page 33</p>

Pages 30 to 33

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 Oh, blanks. Okay. Blanks of zirconia  
2 material?  
3 A. Yes.  
4 Q. How many competitors does Glidewell have?  
5 A. In which market?  
6 Q. For its full zirconia crowns.  
7 A. My understanding is that there are many labs in  
8 the United States, small labs that -- although Glidewell  
9 appears to be the largest single lab for making crowns,  
10 full zirconia crowns, there are many, many small labs  
11 that make them. Some of them are authorized labs that  
12 it has a relationship with, and some of them are not.  
13 So I think the number of competitors in terms  
14 of labs, independent labs, is rather large. I am not  
15 sure of the size, but I am under the understanding that  
16 Glidewell makes maybe 5 percent or 10 -- something  
17 between 5 and 10 percent of full zirconia crowns in the  
18 United States, and therefore, many other labs make the  
19 rest.  
20 MS. ZADRA-SYMES: Can we go off the record for  
21 just a second, please.  
22 THE VIDEOGRAPHER: Off the record at 10:19 a.m.  
Page 34

1 (Recess taken.)  
2 THE VIDEOGRAPHER: Back on the record at  
3 10:19 a.m.  
4 MS. ZADRA-SYMES: I'm going to hand you what's  
5 previously been marked as Exhibit 15.  
6 (Whereupon, Exhibit 15 was marked  
7 for identification.)  
8 BY MS. ZADRA-SYMES:  
9 Q. Have you seen that before?  
10 A. I believe so.  
11 Q. Since I only have one copy of it as it's a  
12 prior exhibit, can you please read the first bullet  
13 point under the photographs?  
14 A. Do you mean the photographs on the left side?  
15 Q. Photographs on the left side.  
16 A. The first bullet point says, "Ideal for bruxers  
17 who have destroyed natural teeth or previous dental  
18 restorations."  
19 Q. Is that a slang use of the term "bruxer"?  
20 A. Well, you know, I am under the impression that  
21 it is.  
22 Q. And why is that?  
Page 35

1 A. Because I've been told that it is.  
2 Q. Who told you that?  
3 A. I think Mr. Shuck told me that, that "bruxer"  
4 is used slang to refer to a person with bruxism.  
5 Q. So other than Mr. Shuck telling you that, you  
6 have no other independent knowledge of it.  
7 A. I've seen it used on the Internet during my  
8 Internet searches. I've seen the word "bruxer" used,  
9 apparently to have this meaning.  
10 The reason why I pause is because of your use  
11 of the word "slang."  
12 Q. Actually, you used it many times in your  
13 report, so that's why I'm asking you. So I'm referring  
14 to your use of the word "slang."  
15 A. Well, thank you. That helps me.  
16 You mean by "slang" what I mean by "slang"?  
17 Q. Yes, exactly.  
18 A. Oh, okay. So do you want me to elaborate on  
19 that or not?  
20 Q. I'm asking you if the word bruxer in these  
21 Glidewell marketing materials is a slang use of the word  
22 "bruxer."  
Page 36

1 A. My understanding is that it is.  
2 Q. And your basis for that understanding is your  
3 discussion with Mr. Shuck?  
4 A. And my investigation on the Internet.  
5 Q. Okay. And when you saw it on the Internet, did  
6 you see it in italics or quotes to indicate that it was  
7 a slang term?  
8 A. I don't know that slang terms are always put in  
9 italics or quotes.  
10 Q. So if the term is used by dentists in technical  
11 scientific journals, would that make it a slang term?  
12 A. It may mean that it's made its way from slang  
13 into, you know, a more formal understanding in usage.  
14 Q. Is it your understanding that Mr. Shuck is a  
15 dentist?  
16 A. No.  
17 Q. What's your understanding of his professional  
18 background?  
19 A. He's, I think, Vice President of Sales for  
20 Glidewell.  
21 Q. Do you know if he has any dentist training?  
22 A. I think he talks to dentists in his company all  
Page 37

Pages 34 to 37

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 the time.</p> <p>2 Q. Did you speak to a Dr. Michael DiTolla at all?</p> <p>3 A. No. I spoke with Mr. Shuck about Dr. D.</p> <p>4 Q. Have you reviewed any videos in which</p> <p>5 Dr. DiTolla is promoting the Glidewell products?</p> <p>6 A. I'd have to go back and look and see.</p> <p>7 Q. But you don't recall if you --</p> <p>8 A. I don't recall right as I sit here if I</p> <p>9 reviewed those particular videos.</p> <p>10 Q. Have you seen the term "bruxer" referenced</p> <p>11 anywhere as a slang term in a dictionary?</p> <p>12 A. Well, usually a dictionary wouldn't reference</p> <p>13 it as a slang term. It might -- it may or it may not.</p> <p>14 I would have to look at that. Usually by the time it's</p> <p>15 made its way into a dictionary, it's sort of considered</p> <p>16 not slang anymore.</p> <p>17 Q. Are you aware that Glidewell has admitted in</p> <p>18 this case that the term "bruxer" is a generic term for</p> <p>19 a person who suffers from bruxism?</p> <p>20 A. You mean have I seen a document that says that?</p> <p>21 Q. Are you aware that in this case Glidewell has</p> <p>22 admitted that the term "bruxer" is a generic term for a</p> <p style="text-align: right;">Page 38</p>	<p>1 Q. And how are they labeled?</p> <p>2 A. Well, it's my understanding that it says</p> <p>3 "BruxZir" on it, like this.</p> <p>4 Q. So as it's shown on Exhibit 15?</p> <p>5 A. Yes.</p> <p>6 Q. So by "BruxZir," you're referring to the term</p> <p>7 that's in the top left-hand corner of Exhibit 15?</p> <p>8 A. Their trademark is pronounced, as I understand</p> <p>9 it, in Europe brux-ZEER [phonetic], and pronounced by</p> <p>10 many people in the United States as brux-ZER [phonetic],</p> <p>11 and occasionally apparently pronounced as BRUX-er</p> <p>12 [phonetic], with a softer Z.</p> <p>13 Q. Is it your understanding that European</p> <p>14 pronunciation is relevant to a U.S. case?</p> <p>15 A. Well, maybe some people in the United States</p> <p>16 pronounce it brux-ZEER too.</p> <p>17 Q. Are you aware of anybody who does?</p> <p>18 A. I haven't talked to anybody who pronounces it</p> <p>19 brux-ZEER in the United States. When I first saw it,</p> <p>20 that's how I pronounced it my own head.</p> <p>21 Q. But you had no experience in dental industry.</p> <p>22 A. That is true.</p> <p style="text-align: right;">Page 40</p>
<p>1 person who suffers from bruxism?</p> <p>2 A. No.</p> <p>3 Q. Are you aware that in this case Glidewell has</p> <p>4 admitted that the term "to brux" is a verb?</p> <p>5 A. Not specifically.</p> <p>6 Q. Is it your opinion that the term "bruxer" is</p> <p>7 not generic for a person who suffers from bruxism?</p> <p>8 A. My opinion is that it is descriptive of a</p> <p>9 person who suffers from bruxism.</p> <p>10 Q. So your opinion is it's not generic for a</p> <p>11 person who suffers from bruxism?</p> <p>12 A. It may be. It may be.</p> <p>13 Q. And are you familiar with the term "to brux" as</p> <p>14 a verb?</p> <p>15 A. Yes.</p> <p>16 Q. How did you become familiar with that?</p> <p>17 A. In my work on this case.</p> <p>18 Q. Have you reviewed any samples of Glidewell's</p> <p>19 products in connection with this case?</p> <p>20 A. Yes.</p> <p>21 Q. And what did you review?</p> <p>22 A. Crowns and the boxes that they come in.</p> <p style="text-align: right;">Page 39</p>	<p>1 Q. How did Mr. Shuck pronounce it?</p> <p>2 A. Brux-ZER.</p> <p>3 Q. And how does Dr. DiTolla pronounce it?</p> <p>4 A. I'm not sure.</p> <p>5 Q. How is it pronounced in Glidewell's marketing</p> <p>6 videos on Glidewell's websites?</p> <p>7 A. I think sometimes it's pronounced brux-ZER, and</p> <p>8 sometimes it's pronounced BRUX-er.</p> <p>9 Q. Is it your position that, in order to be</p> <p>10 considered generic, a term has to appear in a trademark</p> <p>11 office application and registration search?</p> <p>12 A. No.</p> <p>13 MS. ZADRA-SYMES: So can we just take five</p> <p>14 minutes, and then we'll get straight into your report?</p> <p>15 THE WITNESS: Sure.</p> <p>16 THE VIDEOGRAPHER: Off the record at 10:28 a.m.</p> <p>17 (Recess taken.)</p> <p>18 THE VIDEOGRAPHER: Back on the record at</p> <p>19 10:35 a.m.</p> <p>20 MS. ZADRA-SYMES: So I'm going to hand you what</p> <p>21 the court reporter has marked as Exhibit 72.</p> <p>22 (Whereupon, Exhibit 72 was marked</p> <p style="text-align: right;">Page 41</p>

Pages 38 to 41

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 for identification.)</p> <p>2 BY MS. ZADRA-SYMES:</p> <p>3 Q. What is that document?</p> <p>4 A. "Expert Report of David J. Franklyn."</p> <p>5 Q. And do you recognize it?</p> <p>6 A. I do.</p> <p>7 Q. Is this in fact the report that you have</p> <p>8 submitted in connection with this case?</p> <p>9 A. Yes.</p> <p>10 Q. On the signature page, is that your signature?</p> <p>11 A. It is.</p> <p>12 Q. And it was signed on September 15, 2012?</p> <p>13 A. Yes, it was signed on September 15, 2012. I</p> <p>14 think that's right.</p> <p>15 Q. Now, in the appendix there's a curriculum</p> <p>16 vitae, or resume.</p> <p>17 A. Yes.</p> <p>18 Q. Does this have any substantive difference than</p> <p>19 the one that we already looked at earlier today?</p> <p>20 A. I don't know. I don't think so. Looks like</p> <p>21 the only difference is that it's double-spaced.</p> <p>22 Q. Just looking at the top of page 22, there's a</p> <p style="text-align: right;">Page 42</p>	<p>1 Q. How long have you been a professor?</p> <p>2 A. Since 1996.</p> <p>3 Q. So since 1996 you haven't had a private client</p> <p>4 practice as an attorney; is that correct?</p> <p>5 A. That's correct.</p> <p>6 Q. Now in, paragraph 3 of your report --</p> <p>7 A. Yes?</p> <p>8 Q. -- you say, "I was retained in this matter by</p> <p>9 counsel for the Plaintiff, Glidewell Laboratories, to</p> <p>10 render opinions as to whether (1) Plaintiff's registered</p> <p>11 mark 'BruxZir' is predominantly seen as a generic name</p> <p>12 for the service of making solid zirconia dental crowns</p> <p>13 and bridges or from the material from which those crowns</p> <p>14 and/or bridges are made by relevant consumers in the</p> <p>15 relevant markets or submarkets in the United States."</p> <p>16 And I'll stop there before we get to point</p> <p>17 No. 2. Okay?</p> <p>18 What did you mean by "predominantly"?</p> <p>19 A. By a majority of people in the relevant market,</p> <p>20 and that it's predominantly seen as the generic name for</p> <p>21 this product or service.</p> <p>22 Q. Who did you talk to in the relevant market?</p> <p style="text-align: right;">Page 44</p>
<p>1 paragraph that says, "I have written expert reports,</p> <p>2 been deposed, drafted briefs, designed surveys and filed</p> <p>3 trademark applications."</p> <p>4 I believe you testified earlier that you don't</p> <p>5 file trademark applications; is that correct?</p> <p>6 A. I don't generally file trademark applications.</p> <p>7 I may have filed a trademark application in the</p> <p>8 King of Thai noodle case.</p> <p>9 Q. Any others?</p> <p>10 A. I'd have to go back and look. I don't think</p> <p>11 so, but I have advised clients on filing them, sometimes</p> <p>12 extensively advised them on [inaudible mumbling].</p> <p>13 Q. Is there a reason --</p> <p>14 A. I think if you search the USPTO database and</p> <p>15 look for "Franklyn" and see how many trademarks he's</p> <p>16 filed, I think the only file that's going to come up</p> <p>17 with my name on it probably is King of Thai noodle.</p> <p>18 Q. Is there a reason why you don't file trademark</p> <p>19 applications?</p> <p>20 A. I'm too busy being a professor and occasional</p> <p>21 expert witness. I just decided not to go into that</p> <p>22 business.</p> <p style="text-align: right;">Page 43</p>	<p>1 A. I looked at what I told you I did in my</p> <p>2 report: on the Internet, I looked at filings of the</p> <p>3 USPTO, and I talked to Mr. Shuck about the relevant</p> <p>4 market.</p> <p>5 Q. But you didn't talk to anybody in the relevant</p> <p>6 market?</p> <p>7 A. I think Mr. Shuck is in the relevant market.</p> <p>8 Q. Other than Mr. Shuck, did you talk to anybody</p> <p>9 else?</p> <p>10 A. No.</p> <p>11 Q. In this paragraph you didn't reference the</p> <p>12 dental crowns themselves. Were you retained to give an</p> <p>13 opinion as to whether Plaintiff's registered mark</p> <p>14 BruxZir is seen as a generic name for the dental crowns</p> <p>15 themselves?</p> <p>16 A. Yes. I meant that. When I talk about the</p> <p>17 service of making them, the material from which they're</p> <p>18 made and the resulting product. The service of making</p> <p>19 them, and then obviously that results in the dental</p> <p>20 crown itself.</p> <p>21 Q. Okay.</p> <p>22 A. I did not intend by the use of the phrase</p> <p style="text-align: right;">Page 45</p>

Pages 42 to 45

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 "service of making them" to exclude from my opinion the</p> <p>2 resulting product.</p> <p>3 Q. In this Point No. 1 in paragraph 3 you</p> <p>4 reference the relevant consumers. Who are the relevant</p> <p>5 consumers?</p> <p>6 A. I believe I state that in a further section of</p> <p>7 my report. If you'll give me a moment so that I make</p> <p>8 sure I revisit that.</p> <p>9 On page 11 -- would you like me to read it?</p> <p>10 Q. No. I actually -- without looking at your</p> <p>11 report on page 11, you didn't know who the relevant</p> <p>12 consumers were?</p> <p>13 A. Oh, no, I know who the relevant consumers are.</p> <p>14 Q. Okay.</p> <p>15 A. I just don't want to be tricked by you.</p> <p>16 Q. I don't trick people.</p> <p>17 A. No, I can tell. You're a very honest attorney.</p> <p>18 But I have done this before, and if I use a word that's</p> <p>19 slightly than I used later on page 11, somebody will</p> <p>20 say, possibly, "Well, why did you just say it different</p> <p>21 than the way you said it on page 11?" So I asked as a</p> <p>22 courtesy that I may look at it.</p> <p style="text-align: right;">Page 46</p>	<p>1 (The reporter noted that the</p> <p>2 witness was writing on the exhibits</p> <p>3 being marked for the record.)</p> <p>4 THE WITNESS: Did I write on it? Oh, I did, on</p> <p>5 Exhibit 3.</p> <p>6 I won't write on your exhibits. I won't write</p> <p>7 on your exhibits again.</p> <p>8 MS. ZADRA-SYMES: That's okay. But that is the</p> <p>9 exhibit now, for the record, that has your handwriting</p> <p>10 in it.</p> <p>11 THE WITNESS: Yes.</p> <p>12 MS. ZADRA-SYMES: That's fine.</p> <p>13 BY MS. ZADRA-SYMES:</p> <p>14 Q. Then turning to paragraph 5 of your report, you</p> <p>15 list documents that you were provided by counsel for</p> <p>16 Glidewell Laboratories.</p> <p>17 A. Yes.</p> <p>18 Q. Other than what's listed there, have you</p> <p>19 reviewed anything else that was provided to you by</p> <p>20 counsel for Glidewell Laboratories?</p> <p>21 A. No, not other than the actual crowns that I</p> <p>22 looked at.</p> <p style="text-align: right;">Page 48</p>
<p>1 Q. Of course.</p> <p>2 A. Okay?</p> <p>3 Q. Where on page 11 are you looking?</p> <p>4 A. Paragraph 11.</p> <p>5 Q. And paragraph 11 says, "The relevant consumers</p> <p>6 for restorations are dentists for Glidewell's fabricated</p> <p>7 crowns and approved labs for materials."</p> <p>8 A. Yes.</p> <p>9 Q. Are there any other relevant consumers that are</p> <p>10 at issue in this case?</p> <p>11 A. Well, I suppose it could be the case that the</p> <p>12 relevant consumers include the end user patients and how</p> <p>13 they see this mark and if they're exposed to it by</p> <p>14 dentists who talk to them about it, and if they are</p> <p>15 exposed to it in a way that has branding significance.</p> <p>16 But I think that, based on my review of the record and</p> <p>17 of the other searches that I did, the consumers in the</p> <p>18 relevant market in the first instance and the primary</p> <p>19 instance are the dentists, the dental labs -- yeah.</p> <p>20 Q. So dentists and dental labs?</p> <p>21 A. Yes, uh-huh.</p> <p>22 Q. Okay.</p> <p style="text-align: right;">Page 47</p>	<p>1 Q. And which crowns did you look at?</p> <p>2 A. I'd have to go back and look to see which ones</p> <p>3 they were. I looked at crowns that Mr. Tachner showed</p> <p>4 me.</p> <p>5 Q. Were they all manufactured by Glidewell?</p> <p>6 A. I don't believe so.</p> <p>7 Q. Do you know who the other manufacturers were?</p> <p>8 THE WITNESS: Was there a crown -- well, I'll</p> <p>9 have to confirm with him and clarify that, yeah.</p> <p>10 BY MS. ZADRA-SYMES:</p> <p>11 Q. Okay. Because everything that you reviewed in</p> <p>12 connection with this report, we're entitled to know</p> <p>13 about.</p> <p>14 A. Of course.</p> <p>15 Q. So I'd like to know what brands of products you</p> <p>16 looked at --</p> <p>17 A. I will provide that to you in writing.</p> <p>18 Q. Well, for the purposes of this deposition, just</p> <p>19 tell me in the deposition --</p> <p>20 A. Well, of course. But I need to refresh my</p> <p>21 recollection.</p> <p>22 MR. TACHNER: I could tell you if you'd like so</p> <p style="text-align: right;">Page 49</p>

Pages 46 to 49

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 we could just --  
2 MS. ZADRA-SYMES: No, he needs to testify --  
3 THE WITNESS: I need to say it.  
4 MS. ZADRA-SYMES: Yeah.  
5 THE WITNESS: Yeah, so why don't do I that  
6 either later today --  
7 MS. ZADRA-SYMES: That would be fine.  
8 THE WITNESS: -- if we could revisit it on the  
9 record, make it easier.  
10 BY MS. ZADRA-SYMES:  
11 Q. So other than those samples and the documents  
12 listed in paragraph 5 here, are there any other  
13 materials that you've reviewed that were provided to you  
14 by Glidewell or its counsel?  
15 A. I don't believe so, but I would want to go  
16 ahead and double-check that as well for you.  
17 Q. Okay. Thank you.  
18 A. Because I did have a meeting with counsel after  
19 I wrote this report, but I don't think that anything we  
20 went over was new that I hadn't seen before, but I would  
21 like to double-check that to be especially accurate for  
22 you.

Page 50

1 Q. Other than Mr. Shuck and Mr. Tachner, you  
2 haven't met with anybody else in connection with this  
3 case; is that correct?  
4 A. Met with anybody else, anywhere?  
5 Q. In connection with this case. In connection  
6 with your report in this case.  
7 A. Yes, I have.  
8 Q. Okay. Who else have you met with?  
9 A. My research assistant.  
10 Q. And who is that?  
11 A. His name is Brendan Way, W-a-y, who helped  
12 perform research for me in this case.  
13 Q. Anybody else?  
14 A. No.  
15 Q. Then turning to paragraph 6, you say, "In  
16 addition to reviewing the documents that are listed in  
17 paragraph 5, I conducted or caused to be conducted under  
18 my supervision the following searches of the USPTO  
19 databases labs and on the Internet."  
20 A. Yes.  
21 Q. So when you reference "caused to be  
22 conducted" --

Page 51

1 A. Yes?  
2 Q. -- are you referencing conducted by  
3 Brendan Way?  
4 A. Yes.  
5 Q. Did anybody else have any involvement in  
6 conducting searches for you?  
7 A. No.  
8 Q. Paragraph 6(a) -- well, actually, before that  
9 question, have you produced all the results of your  
10 searches in connection with this case to us?  
11 A. I think so. I believe the answer to that is  
12 yes, through the -- electronically, uh-huh.  
13 Q. And that would be the electronic production  
14 that we received on Wednesday night this week?  
15 A. Yes.  
16 Q. Then in 6(a) you say, "I visited and reviewed  
17 the websites of Plaintiff and Defendant on several  
18 occasions between August 15, 2012, and September 15,  
19 2012."  
20 A. Yes.  
21 Q. Have you reviewed them at any other time?  
22 A. No.

Page 52

1 Q. When you reviewed the Plaintiff's website did  
2 you look at the promotional videos on the website?  
3 A. Uh-huh.  
4 Q. You did? Okay.  
5 A. Uh-huh.  
6 Q. So you remember now doing that?  
7 A. I looked at some of them. I don't remember,  
8 you know, extensively how much I looked at all of the  
9 promotional videos.  
10 Q. Do you recall looking at promotional videos  
11 where Dr. DiTolla is speaking about the BruxZir product?  
12 A. I told, I think, earlier, that I did remember  
13 looking at that. Didn't I say that, or no?  
14 Q. I asked you how you pronounced it on --  
15 A. Oh, that I don't recall. Yeah, that I don't  
16 recall. That was a different question.  
17 Q. And in paragraph 6(b) you say, "I conducted  
18 Internet searches for 'brux,' 'bruxer,' 'bruxism,'  
19 'BruxZir,' 'BruxZir crown,' 'bruxing,' 'Zir,' 'zirconia'  
20 and 'solid zirconia' and 'zirconia crown' between  
21 August 15 and September 15."  
22 Have you produced all those search results to

Page 53

Pages 50 to 53



10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 us?</p> <p>2 A. Well, I don't know that I printed out all of</p> <p>3 the search results of all of these searches. Anything</p> <p>4 that I printed out or had my assistant print out, I have</p> <p>5 produced to you.</p> <p>6 Q. And if you didn't print them out, have you</p> <p>7 referenced them somewhere in the report?</p> <p>8 A. I don't know. I'd have to go back and look.</p> <p>9 It helped form my general knowledge base and the</p> <p>10 opinions that I arrived at.</p> <p>11 Q. If the websites that you looked at are not</p> <p>12 referenced in this report, do you have notes of which</p> <p>13 sites you referenced somewhere?</p> <p>14 A. I don't know. I need to talk to Mr. Way and</p> <p>15 see if we have further notes of those searches and</p> <p>16 exactly what we did and which sites we landed on. We</p> <p>17 didn't always just print out everything we found, but I</p> <p>18 would have to go back and look and see if we have notes</p> <p>19 of that. I'd be happy to provide them to you.</p> <p>20 Q. That would be obviously preferably during a</p> <p>21 break in the deposition so we can talk about it today.</p> <p>22 A. Well, I don't know if he's available today to</p> <p style="text-align: right;">Page 54</p>	<p>1 Q. No, I'm asking if you routinely conduct them.</p> <p>2 A. I've conducted TESS searches -- yes. I don't</p> <p>3 know. I mean, not weekly, not monthly, but on, you</p> <p>4 know, nontrivial bases or numbers of times I have</p> <p>5 conducted TESS searches on this -- I was making a</p> <p>6 statement about one of the reasons that these are done.</p> <p>7 Q. But you don't routinely do it?</p> <p>8 A. I didn't say that.</p> <p>9 Q. Okay. The question is -- so you do it not on a</p> <p>10 monthly basis, not on a weekly basis, but not</p> <p>11 insubstantially or something? What did you say?</p> <p>12 A. I say if I were asked to do -- to determine</p> <p>13 whether a particular mark is available for registration</p> <p>14 or has already been registered by another entity, then</p> <p>15 it would be routine to do a TESS search.</p> <p>16 Q. Okay. But you don't do that on a weekly basis</p> <p>17 or a monthly basis?</p> <p>18 A. Well, that's a different usage than the word</p> <p>19 "routinely." That's periodically or frequently.</p> <p>20 Q. Well, how often do you do it for that purpose?</p> <p>21 A. I don't know. I do it every so often when this</p> <p>22 kind of issue comes up in the course of a year and</p> <p style="text-align: right;">Page 56</p>
<p>1 have that conversation, but I will try.</p> <p>2 Q. In paragraph C you reference the United States</p> <p>3 patent and trademark TESS searches that you conducted</p> <p>4 between August 15 and September 15, and then you say,</p> <p>5 "TESS searches are routinely conducted to determine</p> <p>6 whether a particular mark is available for registration</p> <p>7 or has already been registered by another entity."</p> <p>8 Do you routinely conduct trademark searches for</p> <p>9 that purpose?</p> <p>10 A. I have conducted TESS searches for a lot of</p> <p>11 purposes?</p> <p>12 Q. Do you routinely conduct them to determine</p> <p>13 whether a particular mark is available for registration</p> <p>14 or has already been registered by another entity?</p> <p>15 A. I have done that.</p> <p>16 Q. Do you do it routinely?</p> <p>17 A. I don't know what you mean by the word</p> <p>18 "routinely"?</p> <p>19 Q. Well, I'm just using the same word that you</p> <p>20 used in your report.</p> <p>21 A. I said that they are routinely conducted. I</p> <p>22 didn't say that they are by me.</p> <p style="text-align: right;">Page 55</p>	<p>1 somebody asks me for advice about this.</p> <p>2 Q. Okay. That's all I'm asking.</p> <p>3 In paragraph 6(c) you say, "I also conducted or</p> <p>4 caused to be conducted trademark document retrieval</p> <p>5 (TDR) and/or Google searches where appropriate."</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Who conducted those searches?</p> <p>9 A. Either myself or Brendan Way.</p> <p>10 Q. And, again, were those produced to us?</p> <p>11 A. The results of them where we printed them out</p> <p>12 were produced to you.</p> <p>13 Q. Did Brendan Way have any discussions with</p> <p>14 dentists in connection with this case?</p> <p>15 A. No.</p> <p>16 Q. Did Brendan Way have any discussion with dental</p> <p>17 labs in connection with this case?</p> <p>18 A. No.</p> <p>19 Q. Did Brendan Way work on this case from the</p> <p>20 period August 15, 2012, to September 15, 2012?</p> <p>21 A. Yes.</p> <p>22 Q. Did he work full-time on this matter during</p> <p style="text-align: right;">Page 57</p>

Pages 54 to 57

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 that time period?</p> <p>2 A. No.</p> <p>3 Q. So what are his other responsibilities?</p> <p>4 A. Brendan Way is a former student of mine and a</p> <p>5 former market research analyst. Before he became a</p> <p>6 lawyer, he spent five years as a market research</p> <p>7 analyst. He is now an attorney who does a variety of</p> <p>8 kinds of civil litigation, including trademark law, and</p> <p>9 has registered several trademarks and is well trained in</p> <p>10 doing searches in the USPTO databases.</p> <p>11 Q. So he doesn't work for you full-time?</p> <p>12 A. No.</p> <p>13 Q. In paragraph -- it's paragraph 6, but</p> <p>14 subparagraph 4.</p> <p>15 A. Could you tell me what page you're on, please?</p> <p>16 Q. Page 4.</p> <p>17 A. Page 4. Top, middle or bottom?</p> <p>18 Q. It's No. 4.</p> <p>19 A. Oh, 4, uh-huh, right.</p> <p>20 Q. "Our primary TESS search for." You were</p> <p>21 searching for the term "Zir." Do you see that?</p> <p>22 A. Yes.</p> <p>Page 58</p>	<p>1 Q. And how did Mr. Shuck say it?</p> <p>2 A. Brux-ZER and BRUX-er.</p> <p>3 Q. Have you reviewed Mr. Shuck's deposition video?</p> <p>4 A. No.</p> <p>5 Does he say it like you say it?</p> <p>6 Q. Well...</p> <p>7 A. You're not testifying?</p> <p>8 Q. I'm not testifying.</p> <p>9 A. I know.</p> <p>10 Q. Turning to page 9 --</p> <p>11 A. Yes?</p> <p>12 Q. -- paragraph E towards the top of the page.</p> <p>13 A. Uh-huh.</p> <p>14 Q. It says you reviewed numerous Web searches to</p> <p>15 determine whether or not monolithic or solid zirconia</p> <p>16 crowns are referred to as BruxZir crowns.</p> <p>17 A. Yes.</p> <p>18 Q. Okay. We received two Web searches in the</p> <p>19 production that was made on Wednesday.</p> <p>20 A. Uh-huh.</p> <p>21 Q. Are those the Web searches that you're</p> <p>22 referring to in this paragraph?</p> <p>Page 60</p>
<p>1 Q. It says, "None of the search results are</p> <p>2 homophones or phonetically similar to 'BruxZir' or</p> <p>3 'bruxer' aside from the Glidewell marks."</p> <p>4 A. Yes.</p> <p>5 Q. So you were looking for phonetically similar</p> <p>6 marks to BruxZir and the term "bruxer," b-r-u-x-e-r?</p> <p>7 A. Yes.</p> <p>8 Q. And, again, in Search No. 5 in the last</p> <p>9 sentence you say, "None of the search results are</p> <p>10 homophones phonetically similar to 'BruxZir' or 'bruxer'</p> <p>11 aside from the Glidewell marks."</p> <p>12 A. Yes.</p> <p>13 Q. So "BruxZir" and "bruxer" are phonetically</p> <p>14 similar; is that correct?</p> <p>15 A. I don't think they're phonetically similar.</p> <p>16 Q. You don't think "BruxZir" and "bruxer" are</p> <p>17 phonetically similar?</p> <p>18 A. Well, the way you're saying them, I think</p> <p>19 intentionally to make them sound phonetically similar,</p> <p>20 they could be seen as phonetically similar.</p> <p>21 Q. So how do you say them?</p> <p>22 A. Brux-ZER and BRUX-er.</p> <p>Page 59</p>	<p>1 A. I'm sorry. Please state that again.</p> <p>2 MS. ZADRA-SYMES: Can you read the question,</p> <p>3 please.</p> <p>4 (Record read as follows:</p> <p>5 "Question: Are those the Web</p> <p>6 searches that you're referring to in</p> <p>7 this paragraph?")</p> <p>8 THE WITNESS: Can I see the ones that you're</p> <p>9 referencing?</p> <p>10 MS. ZADRA-SYMES: Can you mark that as the next</p> <p>11 exhibit number, please.</p> <p>12 Handing you what the court reporter has marked</p> <p>13 as Exhibit No. 73.</p> <p>14 (Whereupon, Exhibit 73 was marked</p> <p>15 for identification.)</p> <p>16 THE WITNESS: Yes.</p> <p>17 MS. ZADRA-SYMES: And let's mark this one</p> <p>18 as 74.</p> <p>19 (Whereupon, Exhibit 74 was marked</p> <p>20 for identification.)</p> <p>21</p> <p>22 BY MS. ZADRA-SYMES:</p> <p>Page 61</p>

Pages 58 to 61

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 Q. So these are the only Web search report results</p> <p>2 that we received in the production on Wednesday night.</p> <p>3 So did you do any other searches?</p> <p>4 A. I think we did. I don't know if we printed</p> <p>5 them out. I have to go back and look at those notes</p> <p>6 that we talked about a moment ago.</p> <p>7 Q. And then further down in the same section of</p> <p>8 the report here on page 9, you said, "When one types the</p> <p>9 search term 'bruxer crown' into Google, at least as of</p> <p>10 September 15, the search engine automatically corrects</p> <p>11 the term to 'bruxzir crown' with a Z."</p> <p>12 A. Yes.</p> <p>13 Q. With a lowercase b and a lowercase z?</p> <p>14 A. Yes, ma'am.</p> <p>15 Q. Then you say, "and all but one of the first</p> <p>16 five pages of results are clearly referring to the</p> <p>17 Glidewell BruxZir product."</p> <p>18 Do you see that?</p> <p>19 A. Yes, I see that.</p> <p>20 Q. We did not receive five pages of results.</p> <p>21 A. I see that. You should. We will get you the</p> <p>22 five pages of results.</p> <p>Page 62</p>	<p>1 crown," b-r-u-x-e-r crown --</p> <p>2 A. Yes?</p> <p>3 Q. -- is a Glidewell crown?</p> <p>4 A. I would have to go back and look and dig down</p> <p>5 into this particular website.</p> <p>6 Q. So you don't know?</p> <p>7 A. Not as I sit here.</p> <p>8 Q. Then the next one on the list on Exhibit 74 is</p> <p>9 Z-Brux crowns. Do you see that?</p> <p>10 A. Yes, I do.</p> <p>11 Q. Is it your understanding that Z-Brux crown is a</p> <p>12 Glidewell product?</p> <p>13 A. I need -- this is barthlab.com. I would want</p> <p>14 to go back and look at that.</p> <p>15 Q. So you don't know?</p> <p>16 A. Right.</p> <p>17 Q. And then the next one down is Twitter --</p> <p>18 A. Well, he says here, "When you force-quote</p> <p>19 Google to search for a bruxer crown, one of the first</p> <p>20 search results that come up" -- I'm talking about my</p> <p>21 report at page 9 -- "is Barth Dental Laboratories, which</p> <p>22 offers a Z-Brux crown that makes reference to a</p> <p>Page 64</p>
<p>1 Q. And turning to what we did receive, which is</p> <p>2 the first search you're referring to where the</p> <p>3 search engine automatically corrects the search to</p> <p>4 "bruxzir crown" with a Z, if you look at Exhibit 74 --</p> <p>5 A. Yes?</p> <p>6 Q. -- that appears to be the search you're</p> <p>7 referring to.</p> <p>8 A. Yes.</p> <p>9 Q. On that page, is it correct that they're all</p> <p>10 referring to the Glidewell product?</p> <p>11 A. Let me just go ahead and take another glance at</p> <p>12 it.</p> <p>13 Well, I believe Mr. Way clicked on all of them</p> <p>14 and went to the websites of all of these to verify that</p> <p>15 they were referring to the Glidewell product. And based</p> <p>16 on that, we made this statement.</p> <p>17 Q. Okay. So, according to your report then --</p> <p>18 A. Yes?</p> <p>19 Q. -- the fourth reference on page 1 of the search</p> <p>20 report that's in Exhibit 74 --</p> <p>21 A. Yes?</p> <p>22 Q. -- that references "full zirconia bruxer</p> <p>Page 63</p>	<p>1 March 2011 article in Dental Economics," and then it's</p> <p>2 discussed.</p> <p>3 "However, a Web search for the article notes</p> <p>4 that Glidewell is the initiator of the solid zirconia</p> <p>5 tooth restoration," and it's largely about BruxZir. So</p> <p>6 I'd have to -- I'd want to go back and do the digging</p> <p>7 into the website to give you a better answer of this</p> <p>8 particular one.</p> <p>9 Q. Okay.</p> <p>10 A. Okay?</p> <p>11 Q. And then the next one is Twitter/PittmanLab.</p> <p>12 A. Uh-huh.</p> <p>13 Q. "Get our custom 'Bruxer,'" B-r-u-x-e-r.</p> <p>14 Do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. Is it your opinion that that is a Glidewell</p> <p>17 product?</p> <p>18 A. Again, I would want to double-check.</p> <p>19 Q. And then further down the page there's a</p> <p>20 heading that says "Full Zirconia Crown."</p> <p>21 A. Yes.</p> <p>22 Q. It's a reference to continental dental.com, and</p> <p>Page 65</p>

Pages 62 to 65

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 then --  
2 A. Yes, I see that.  
3 Q. Is it your opinion that that's a Glidewell  
4 product?  
5 A. I would also need to go back and check that  
6 particular website.  
7 Q. And then further down the page --  
8 A. Yes?  
9 Q. -- "Dental Lab Service, Infinity Dental  
10 Laboratory."  
11 Do you see that?  
12 A. Yes.  
13 Q. It says under there, "We also offer full  
14 zirconia or Bruxer" -- B-r-u-x-e-r -- "crowns."  
15 A. I see that.  
16 Q. Is it your opinion that's a Glidewell product?  
17 A. I would want to go back and check.  
18 Q. Okay. And during the break you will also  
19 obtain for us the other pages that you reference in your  
20 report that we don't have?  
21 A. I will attempt to do so, if I can get ahold of  
22 Mr. Way.

Page 66

1 Q. And then also looking at Exhibit No. 74, at the  
2 top where it says how many hits were received on that  
3 search --  
4 A. Uh-huh?  
5 Q. -- it says there are 50,500 results.  
6 A. You're in Exhibit 74?  
7 Q. Yes.  
8 A. I see that.  
9 Q. Did you or your assistant look at all 50,000  
10 results -- or 50,500 results? Sorry.  
11 A. I think he looked at the several first pages  
12 that are mentioned.  
13 Q. And then in Exhibit 73 at the top, the search  
14 references 10,500 results. Do you see that?  
15 A. I do.  
16 Q. Did you or your research assistant look at all  
17 those results?  
18 A. He didn't look at all 10,000 results.  
19 Q. What did he look at?  
20 A. I believe the first five pages for each.  
21 Q. So did your research assistant actually write  
22 this report?

Page 67

1 A. No.  
2 Q. Okay. So when you said "he said" in  
3 paragraph 9, who were you referring to?  
4 A. I'm referring to myself based on the  
5 information that he gave me.  
6 Q. And on page 10 --  
7 A. Yes?  
8 Q. -- in the top paragraph, which is  
9 paragraph 6(e), there's a reference to 170 BruxZir,  
10 B-r-u-x-Z-i-r, certified labs.  
11 Do you see that?  
12 A. Just give me a moment, please. You're on  
13 page 10?  
14 Q. Yes.  
15 A. You're about six lines down?  
16 Q. Yes.  
17 A. Yes, I see that.  
18 Q. Would you like to read it before I ask you a  
19 question?  
20 A. Go ahead.  
21 Q. So have you looked at the websites of the 170  
22 BruxZir-certified labs?

Page 68

1 A. I need to double-check on that.  
2 Q. Do you know if Glidewell's labs actually  
3 identify themselves as licensees of Glidewell?  
4 A. On their websites?  
5 Q. Yes.  
6 A. I do not know. I know they identify -- they  
7 agree to identify -- to use the BruxZir trademark and  
8 some sort of labeling on the product that they make and  
9 the box that they put it in.  
10 Q. How do you know that?  
11 A. I was told that by either Mr. Shuck or  
12 Mr. Tachner.  
13 Q. Did you see any samples of that?  
14 A. I would have to go back and look at the samples  
15 that I referenced earlier before I give you a definitive  
16 answer on that.  
17 Q. In the same paragraph you say, "Furthermore,  
18 the splash page for Barth Dental Laboratories advertises  
19 \$40 off your first BruxZir" -- B-r-u-x-Z-i-r -- "crown.  
20 One much assume that Barth is either such a new  
21 BruxZir" -- B-r-u-x-Z-i-r -- "certified lab that their  
22 Web page has numerous typos on it while they come up to

Page 69

Pages 66 to 69

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 speed, or they are attempting to free-ride on the</p> <p>2 advertising on the network of over 170 BruxZir" --</p> <p>3 B-r-u-x-Z-i-r -- "certified labs."</p> <p>4 A. Yes?</p> <p>5 Q. Did you check to see whether Barth is a</p> <p>6 certified lab of Glidewell?</p> <p>7 A. I think we did, but I don't recall the result</p> <p>8 of that investigation at this point in time. But I can</p> <p>9 give you that too.</p> <p>10 Q. So is it your opinion that everybody who is</p> <p>11 using the term B-r-u-x-Z-i-r is attempting to free-ride</p> <p>12 on Glidewell's B-r-u-x-Z-i-r trademark?</p> <p>13 A. If they use the term B-r-u-x-Z-i-r, yes.</p> <p>14 Q. Even if it's not used with a capital B or a</p> <p>15 capital Z.</p> <p>16 A. I don't think they should be using it.</p> <p>17 Q. Even if it's not with a capital B or a</p> <p>18 capital Z?</p> <p>19 A. Correct.</p> <p>20 Q. Okay.</p> <p>21 A. Yes, because the word "BruxZir" with a Z-i-r is</p> <p>22 not the same as the word b-r-u-x-e-r.</p> <p style="text-align: right;">Page 70</p>	<p>1 you're asking me general questions, but I'm talking</p> <p>2 about a specific example.</p> <p>3 Q. I'm asking you what you mean in this report in</p> <p>4 paragraph 10 --</p> <p>5 A. And I think I answered it. You asked me</p> <p>6 whether B-r-u-x-Z-i-r even if the B and the Z are not</p> <p>7 capitalized --</p> <p>8 Q. Yes.</p> <p>9 A. -- is potentially free riding on Glidewell's</p> <p>10 registered trademark, and I said yes, if they're not</p> <p>11 authorized.</p> <p>12 Q. And you don't know if Barth is authorized?</p> <p>13 A. I will find out for you.</p> <p>14 Q. Okay. So going back to Exhibit No. 74 --</p> <p>15 A. Yes?</p> <p>16 Q. -- the fourth reference down says "full</p> <p>17 zirconia Bruxer crown," B-r-u-x-e-r.</p> <p>18 A. Yes.</p> <p>19 Q. Is that an attempt to ride on Glidewell's</p> <p>20 BruxZir name?</p> <p>21 A. Not in my opinion.</p> <p>22 Q. The next one down Z-Brux crowns, is that an</p> <p style="text-align: right;">Page 72</p>
<p>1 Q. So if they're using it as b-r-u-x-e-r, are they</p> <p>2 attempting to free-ride on the B-r-u-x-Z-i-r trademark?</p> <p>3 A. They may be, as in the case of your client</p> <p>4 where they do "KDZ Bruxer" as part of their trademark.</p> <p>5 But not every use in other contexts where it's not used</p> <p>6 as part of the brand name would be an attempt to free</p> <p>7 ride.</p> <p>8 Q. Okay. Sir, are you saying that Glidewell has</p> <p>9 exclusive rights over the use of the term "Z" with the</p> <p>10 term "Brux" in a trademark?</p> <p>11 A. No.</p> <p>12 Q. What are you saying?</p> <p>13 A. I'm saying that I think your client is causing</p> <p>14 a likelihood of confusion by intentionally putting the</p> <p>15 word "KDZ" in, in front of the word "Bruxer,"</p> <p>16 B-r-u-x-e-r.</p> <p>17 Q. So it is your opinion, then, that the use of</p> <p>18 the letter Z in a trademark for a zirconia crown is</p> <p>19 something that would cause confusion with the Glidewell</p> <p>20 trademark?</p> <p>21 A. That's not what I said. I said in the context</p> <p>22 of this case I think that it does. You know all --</p> <p style="text-align: right;">Page 71</p>	<p>1 attempt to ride on Glidewell's BruxZir name?</p> <p>2 A. Well, after that it says "BruxZir" with a</p> <p>3 Z-i-r.</p> <p>4 Q. Okay. I'm referring to just the Z-Brux crowns.</p> <p>5 Is that an attempt?</p> <p>6 A. You have to look at the whole thing together.</p> <p>7 Q. The trademark Z-Brux crowns.</p> <p>8 A. Well, how do you know that that's a trademark</p> <p>9 for Z-Brux crowns?</p> <p>10 Q. If it is a trademark.</p> <p>11 A. It doesn't say.</p> <p>12 Q. As a hypothetical question, in your</p> <p>13 professional opinion --</p> <p>14 A. Yes?</p> <p>15 Q. -- if Z-Brux crowns is a trademark, would this</p> <p>16 be an attempt to ride on Glidewell's mark?</p> <p>17 A. I would have to look at more details of all of</p> <p>18 the marketing materials, the way it's presented to the</p> <p>19 relevant public and whether there's a risk of confusion.</p> <p>20 Q. So without that, you wouldn't be able to</p> <p>21 determine it?</p> <p>22 A. Without that, I would not wish to give an</p> <p style="text-align: right;">Page 73</p>

Pages 70 to 73

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 opinion on it in this deposition?  
2 Q. For your report, did you review all those  
3 materials of Barth Dental Laboratories?  
4 A. I -- for Barth Dental Laboratories I said it's  
5 either this or that or this or that. That's what I  
6 said. I didn't -- we reviewed the website of Barth  
7 Dental Laboratories. We looked at it in careful  
8 consideration, yes.  
9 Q. Did you review any other materials of Barth  
10 Dental --  
11 A. I don't have --  
12 Q. -- laboratories?  
13 A. -- access to their independent, hard-print  
14 materials.  
15 Q. Did you speak to anybody at Barth Dental?  
16 A. No.  
17 Q. Then the next one on the list is  
18 Twitter/PittmanLab.  
19 A. Yes.  
20 Q. It says, "Get Our Custom Bruxer," B-r-u-x-e-r,  
21 and in the summary underneath that it says, "Get our  
22 custom Bruxer" -- B-r-u-x-e-r -- "bur" -- b-u-r --  
Page 74

1 "block to aid in all your Bruxer crown" -- B-r-u-x-e-r,  
2 crown.  
3 Would that be an attempt to free-ride on the  
4 Glidewell trademark?  
5 A. That alone I don't think is, no.  
6 Q. Then further down the page under the heading  
7 "Full Zirconia Crown" --  
8 A. Yes?  
9 Q. -- would that reference to full zirconia crown  
10 by Continental Dental Laboratories be an attempt to  
11 free-ride on the Glidewell trademark -- I'm sorry -- the  
12 Glidewell BruxZir trademark?  
13 A. Just that? What, those three words?  
14 Q. Yes.  
15 A. "Full zirconia crown"?  
16 Q. Uh-huh.  
17 A. No.  
18 Q. And then further down the page, under "Dental  
19 Lab Service, Infinity Dental Laboratory," they state,  
20 "We also offer full zirconia or 'Bruxer,'" B-r-u-x-e-r  
21 in quotes -- "crowns for a full porcelain crown."  
22 Do you see that?  
Page 75

1 A. Yes, I do.  
2 Q. Would that reference to Bruxer be an attempt to  
3 free-ride on the BruxZir trademark?  
4 A. Not necessarily. Not unless they were  
5 attempting to imply that they were an authorized lab of  
6 Glidewell. I think if I were advising them, I would  
7 have told them not to capitalize the B.  
8 I think there's an argument that they're using  
9 it in a way that is not meant to be a trademark. If  
10 they're using it in a way that's not meant to be a  
11 trademark, but just a reference to the crown, then  
12 that's different than using it as a trademark.  
13 Q. And on page 10 --  
14 A. Yes? Of my report?  
15 Q. -- of your report, after the sentence we just  
16 referenced, the next sentence says, "Additional hits are  
17 found for the York Dental Lab BruxZir crown, which  
18 apparently is such a new product, it does not appear on  
19 York's crown and bridge Rx form certainly available from  
20 the site."  
21 A. I've lost you. Let me find it.  
22 Q. It's the sentence beginning --  
Page 76

1 A. Oh, you're up a little bit higher. Just one  
2 moment, please.  
3 Okay. Yes, I see the language.  
4 MS. ZADRA-SYMES: Okay. Now, we did not get  
5 that hit from your production. It was not in the search  
6 results, but we do have a printout of that page from  
7 documents produced by Keating Dental in this case.  
8 So I'm handing you what the court reporter has  
9 marked as Exhibit 75, which is documents Bates-stamped  
10 KDA-002445 and has been introduced in this case.  
11 (Whereupon, Exhibit 75 was marked  
12 for identification.)  
13 BY MS. ZADRA-SYMES:  
14 Q. Is the reference in your report on page 10 to  
15 the York Dental Lab BruxZir crown a reference to this  
16 crown shown in this document?  
17 A. I am not sure without going back and  
18 double-checking. I would want to do that before saying  
19 yes or no based on just looking at this page.  
20 Q. Looking at the top of this page, it's headed  
21 "Bruxer," B-r-u-x-e-r.  
22 Do you see that?  
Page 77

Pages 74 to 77



10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 A. I do, yes.</p> <p>2 Q. And underneath it says "Bruxer Solid</p> <p>3 Zirconia" -- capital B, capital S, capital Z -- "is a</p> <p>4 monolithic solid zirconia restoration with no porcelain</p> <p>5 overlay."</p> <p>6 A. Uh-huh?</p> <p>7 Q. Is this an attempt to free-ride on the BruxZir</p> <p>8 trademark?</p> <p>9 A. I wouldn't give an opinion about that.</p> <p>10 Q. So you don't know?</p> <p>11 A. I don't know looking at just this.</p> <p>12 Q. So when --</p> <p>13 A. Are they using it as a trademark?</p> <p>14 Q. I don't know. This is their Web page that is</p> <p>15 referenced in your report.</p> <p>16 A. Yes, yes. But I don't see an R. I don't see</p> <p>17 a TM after that.</p> <p>18 Q. Okay. So that would help to indicate if it was</p> <p>19 being used as a trademark?</p> <p>20 A. It could, yes.</p> <p>21 Q. Then the next one referenced in your report is</p> <p>22 Mascola Esthetics Dental Lab.</p> <p>Page 78</p>	<p>1 will do for you.</p> <p>2 Q. On the first page --</p> <p>3 A. Yes?</p> <p>4 Q. -- there is -- this is an Rx form. Do you see</p> <p>5 that at the top? It says --</p> <p>6 A. I do, yes, yes.</p> <p>7 Q. On the first page, in the second column under</p> <p>8 "Cosmetics," there's a reference to Xtreme, with a</p> <p>9 capital X-t-r-e-m-e, Bruxer, B-r-u-x-e-r.</p> <p>10 A. Yes, I see that.</p> <p>11 Q. And in parentheses "Solid Zirconia." Do you</p> <p>12 see that?</p> <p>13 A. I do see that, yes.</p> <p>14 Q. Is that an attempt to free-ride on the</p> <p>15 Glidewell BruxZir trademark.</p> <p>16 A. It may be. I would want to look at more of</p> <p>17 their information.</p> <p>18 Q. Have you looked at any other information of the</p> <p>19 Mascola Esthetics Dental Lab?</p> <p>20 A. We did do some digging here on it, but I'd have</p> <p>21 to go back and refresh my recollection about the</p> <p>22 Internet archive that we're referring to.</p> <p>Page 80</p>
<p>1 A. Yes?</p> <p>2 Q. We did not receive anything in the production</p> <p>3 you gave us regarding Mascola Esthetics Dental Lab.</p> <p>4 A. Let me make a note of that too, and if we</p> <p>5 printed that out, we will get that to you.</p> <p>6 MS. ZADRA-SYMES: Can you make that one</p> <p>7 exhibit.</p> <p>8 This is actually one exhibit, 76.</p> <p>9 (Whereupon, Exhibit 76 was marked</p> <p>10 for identification.)</p> <p>11 MS. ZADRA-SYMES: So this is two documents that</p> <p>12 have been produced in this case. The first one is</p> <p>13 Bates-numbered KDA-002444, and then the next pages are</p> <p>14 KDA-002799 through KDA-002800.</p> <p>15 THE WITNESS: Uh-huh?</p> <p>16 BY MS. ZADRA-SYMES:</p> <p>17 Q. Do you see that?</p> <p>18 A. I do, yeah.</p> <p>19 Q. Is this the product that's being referenced in</p> <p>20 your report on page 10 as the Mascola Esthetics Dental</p> <p>21 Lab?</p> <p>22 A. I don't know. I need to double-check, which I</p> <p>Page 79</p>	<p>1 Q. Turning to the next page --</p> <p>2 A. Yes?</p> <p>3 Q. -- under the fee schedule --</p> <p>4 A. Yes?</p> <p>5 Q. -- there's a reference under "Cosmetics"</p> <p>6 slightly more than halfway down.</p> <p>7 Do you see that?</p> <p>8 A. I do.</p> <p>9 Q. It says "Full-Contour Zirconia BruxZir."</p> <p>10 A. I do.</p> <p>11 Q. Is that an attempt to free-ride on the</p> <p>12 Glidewell BruxZir trademark?</p> <p>13 A. It may be.</p> <p>14 Q. What was your opinion in this report based on</p> <p>15 when you were referencing the Mascola Esthetics Dental</p> <p>16 Lab? What were you looking at?</p> <p>17 A. We were looking at the Internet archive and</p> <p>18 their website, a snapshot of their home page, but</p> <p>19 apparently we haven't given you that.</p> <p>20 Q. No.</p> <p>21 A. But we will.</p> <p>22 Q. Did you review any other materials of Mascola</p> <p>Page 81</p>

Pages 78 to 81

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 Esthetics Dental Lab?</p> <p>2 A. None other than what's referenced in this</p> <p>3 paragraph.</p> <p>4 Q. Did you speak to anybody at Mascola Dental</p> <p>5 Labs?</p> <p>6 A. No.</p> <p>7 THE WITNESS: Can we take a quick bathroom</p> <p>8 break?</p> <p>9 MS. ZADRA-SYMES: Yes, of course.</p> <p>10 THE VIDEOGRAPHER: Off the record at 11:29 a.m.</p> <p>11 This is the end of Tape 1.</p> <p>12 (Recess taken.)</p> <p>13 THE VIDEOGRAPHER: And we are on the record</p> <p>14 at 11:35 a.m. This is the beginning of Tape 2.</p> <p>15 BY MS. ZADRA-SYMES:</p> <p>16 Q. Are you familiar with the ability to pay Google</p> <p>17 to ensure that a website displays a term higher in</p> <p>18 search results?</p> <p>19 A. Yes.</p> <p>20 Q. And did you ask Glidewell if it had done that?</p> <p>21 A. No.</p> <p>22 Q. Are you familiar with the use of meta tags in a</p> <p style="text-align: right;">Page 82</p>	<p>1 make them less important so that people can't get up</p> <p>2 high in the natural search results, and now they're</p> <p>3 forced to try to pay Google to get up high.</p> <p>4 So, I mean, I'm very, very well aware of about</p> <p>5 these practices, and I haven't investigated that at all</p> <p>6 in any of those permutations with regard to Glidewell or</p> <p>7 Keating.</p> <p>8 Q. And that would be true for whether they have</p> <p>9 made paid placements for their own trademark BruxZir or</p> <p>10 for the term "bruxer," b-r-u-x-e-r?</p> <p>11 A. I have not looked into that for either of those</p> <p>12 terms or "again" for Keating.</p> <p>13 THE WITNESS: Has there been discovery in that?</p> <p>14 BY MS. ZADRA-SYMES:</p> <p>15 Q. When is a trademark considered descriptive?</p> <p>16 A. When it describes a quality, characteristic or</p> <p>17 ingredient or use of the product or service in</p> <p>18 connection -- in which connection it's going to be used</p> <p>19 as a trademark.</p> <p>20 Q. If a trademark is descriptive at the time it's</p> <p>21 adopted, is it protectable or registerable?</p> <p>22 Is it registerable?</p> <p style="text-align: right;">Page 84</p>
<p>1 Web page to get listed higher in search results?</p> <p>2 A. Yes.</p> <p>3 Q. Did you ask Glidewell if they had done that?</p> <p>4 A. No.</p> <p>5 Q. Did your research assistant ask them?</p> <p>6 A. No.</p> <p>7 Q. And that would be the same for both my prior</p> <p>8 questions?</p> <p>9 A. Yes.</p> <p>10 I would elaborate just slightly, although the</p> <p>11 answer is still the same, which is no. There are many</p> <p>12 different ways to get higher in Google search results,</p> <p>13 and -- including by payment, one of which is to buy</p> <p>14 generic words or common words or related words as search</p> <p>15 terms. Another way is to buy your own trademark as a</p> <p>16 search term.</p> <p>17 But there are new ways now. Google is getting</p> <p>18 very sophisticated and complicated in how it -- like</p> <p>19 Google shopping. So paid placement is a big issue.</p> <p>20 Q. Uh-huh.</p> <p>21 A. And then meta tags are, frankly, less important</p> <p>22 than they used to be because Google has worked hard to</p> <p style="text-align: right;">Page 83</p>	<p>1 A. A trademark that is merely descriptive is not</p> <p>2 registerable or protectable at common law, but it can</p> <p>3 become protectable at common law, and it can become</p> <p>4 registerable if it acquires trademark significance in</p> <p>5 the minds of the public. And that trademark</p> <p>6 significance is usually referred to with the term of art</p> <p>7 "secondary meaning."</p> <p>8 Q. In the trademark office, how does the trademark</p> <p>9 office determine if a mark has acquired secondary</p> <p>10 meaning?</p> <p>11 A. Oh, different ways. You can provide evidence.</p> <p>12 If there is a office action against the mark on the</p> <p>13 ground that it's descriptive, they may never actually</p> <p>14 require secondary action. If they decide they think</p> <p>15 linguistically or grammatically based on the materials</p> <p>16 they've been given that it's suggestive, they may not</p> <p>17 require any kind of evidence. But if you have to submit</p> <p>18 evidence to overcome an objection, for example, you</p> <p>19 might provide evidence of extensive advertising,</p> <p>20 longtime use, affidavits, other related evidence to show</p> <p>21 that it has or is likely to have acquired secondary</p> <p>22 meaning in the minds of the consuming public.</p> <p style="text-align: right;">Page 85</p>

Pages 82 to 85

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 Q. How much use does the trademark office usually</p> <p>2 look for in terms of relation?</p> <p>3 A. Well, I think that there's a presumption that</p> <p>4 if a descriptive term has been used for five years, that</p> <p>5 it would be assumed or presumed that it has secondary</p> <p>6 meaning. But that's just a sort of presumption, and</p> <p>7 marks that have been used for less than that can be</p> <p>8 found to have acquired secondary meaning.</p> <p>9 Q. Turning back to page 11 of your report --</p> <p>10 A. Yes?</p> <p>11 Q. -- you say in paragraph 8, "A mark is</p> <p>12 categorized as generic and thus not entitled to legal</p> <p>13 protection under U.S. trademark law when it is seen by a</p> <p>14 majority of relevant consumers in the relevant markets</p> <p>15 as a generic name for a particular service or good" and</p> <p>16 you cite to the case King-Seeley Thermos Co. v. Aladdin</p> <p>17 Industries, Inc., which is a Second Circuit case</p> <p>18 from 1963.</p> <p>19 A. Yes.</p> <p>20 Q. Is there a reason why you didn't cite a</p> <p>21 California case?</p> <p>22 A. No.</p> <p>Page 86</p>	<p>1 your client entered the market and what the status of</p> <p>2 use was in the relevant marketplace at that time.</p> <p>3 Q. Do you know when our client entered the market?</p> <p>4 A. Yes. I think it entered the market --</p> <p>5 Glidewell entered the market, to my knowledge, in June</p> <p>6 of 2009, and your client entered the market in 2011, the</p> <p>7 exact month of which is escaping me as we speak. Part</p> <p>8 of my confusion about that was that you filed a -- your</p> <p>9 client filed a, I believe, 1(b) trademark application,</p> <p>10 which is an intent to use. So I had to dig around a</p> <p>11 little bit and think to figure out when their actual</p> <p>12 first use was. But it was sometime in 2011.</p> <p>13 Q. And your understanding is that Glidewell began</p> <p>14 marketing its products in June of 2009?</p> <p>15 A. Yes. Under the BruxZir name, June of 2009.</p> <p>16 Q. Yes.</p> <p>17 In paragraph 13, on page 11 --</p> <p>18 A. Yes.</p> <p>19 Q. -- you say, "The Plaintiff's registered</p> <p>20 trademark BruxZir is, in my opinion, a suggestive mark</p> <p>21 because it suggests a particular quality or</p> <p>22 characteristic of the goods and services Glidewell</p> <p>Page 88</p>
<p>1 Q. Are you familiar with the California cases</p> <p>2 involving genericness in the Ninth Circuit?</p> <p>3 A. Yes.</p> <p>4 Q. You understand this case is a Ninth Circuit --</p> <p>5 it's a case pending in California?</p> <p>6 A. Yes, yes. And Ninth Circuit law would govern.</p> <p>7 Q. Are you familiar with the "who-are-you/what-</p> <p>8 are-you" test?</p> <p>9 A. Yes.</p> <p>10 Q. Why did you not reference that in your report?</p> <p>11 A. No particular reason. I'd be happy to discuss</p> <p>12 it with you if you want me to now or at trial.</p> <p>13 Q. So what is the most recent case in California</p> <p>14 that applies the "who-are-you/what-are-you" test in the</p> <p>15 Ninth Circuit?</p> <p>16 A. I don't know the most recent case. I can tell</p> <p>17 you the Yellow Cab case is important in this regard,</p> <p>18 which holds, among other things, that the time for</p> <p>19 genericness is the time when the defendant entered the</p> <p>20 market, not thereafter.</p> <p>21 So in this case in trying to determine whether</p> <p>22 the Plaintiff's mark was generic, we'd want to see when</p> <p>Page 87</p>	<p>1 provides."</p> <p>2 What quality or characteristic is it</p> <p>3 suggesting?</p> <p>4 A. That zirconia is a good material to use for</p> <p>5 patients who have teeth damage due to bruxism.</p> <p>6 Q. Anything else?</p> <p>7 A. Anything else? Well, it suggests -- no,</p> <p>8 nothing else.</p> <p>9 Q. Does it suggest anything about the intended</p> <p>10 user?</p> <p>11 A. I think I just said that. I said that it</p> <p>12 suggests that zirconium is a good product to use for</p> <p>13 patients who suffer defects that could have occurred</p> <p>14 from bruxism.</p> <p>15 Q. And what are those patients referred to as in</p> <p>16 the dental industry?</p> <p>17 A. Well, I think we went over this, but some of</p> <p>18 those patients are referred to as bruxers, people who</p> <p>19 grind. They're also referred to as grinders.</p> <p>20 Q. Turning to paragraph 14 --</p> <p>21 A. Yes?</p> <p>22 Q. -- you say, "A search of the Internet and of</p> <p>Page 89</p>

Pages 86 to 89

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 the USPTO databases reveals that the generic name for</p> <p>2 solid zirconia crowns is 'solid zirconia,' 'full-contour</p> <p>3 zirconia,' 'total zirconia' or 'monolithic zirconia.'"</p> <p>4 Do you see that?</p> <p>5 A. Yes, I see it.</p> <p>6 Q. And I believe you referenced earlier that</p> <p>7 another generic reference that's a synonym of "solid</p> <p>8 zirconia" and "full-contour zirconia" would also be</p> <p>9 "all-zirconia"; is that correct?</p> <p>10 A. Yes.</p> <p>11 Q. And then the example given is a page from the</p> <p>12 ada.org product guide.</p> <p>13 A. Yes.</p> <p>14 Q. Do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. Were there any other printouts that you made</p> <p>17 for searches dealing with this point? Because we only</p> <p>18 received that one page.</p> <p>19 A. Oh, I see. I need to go back and look on that.</p> <p>20 Let me make a note of that too, because I do say CEG,</p> <p>21 and I want to make sure that you have a full printout of</p> <p>22 whatever we saw, if we printed it out, if we printed out</p> <p style="text-align: right;">Page 90</p>	<p>1 A. I see that.</p> <p>2 Q. And it says "Vendor, Oral Arts Dental</p> <p>3 Laboratory, Inc."</p> <p>4 A. Yes.</p> <p>5 Q. There is no TM or R in a circle after the word</p> <p>6 "BruxZir." Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Do you know if Oral Arts Dental Laboratory is</p> <p>9 an Glidewell-authorized laboratory?</p> <p>10 A. I do believe that Mr. Way made that</p> <p>11 investigation and found out that it is.</p> <p>12 Q. From these website pages can you tell --</p> <p>13 A. No. You would have to go further, but he did</p> <p>14 go further, to my recollection.</p> <p>15 Q. And then next one is "BruxZir Solid Zirconia,"</p> <p>16 again without a TM or an R in a circle, and that one</p> <p>17 lists Glidewell Laboratories as the vendor.</p> <p>18 Do you see that?</p> <p>19 A. Yes, I do.</p> <p>20 Q. Below that, there's another one with "BruxZir</p> <p>21 Total Zirconia Crowns" --</p> <p>22 A. I see that.</p> <p style="text-align: right;">Page 92</p>
<p>1 other pages. As I said before, we didn't necessarily</p> <p>2 print out every single research result, but we tried to.</p> <p>3 So let me go back and look at that.</p> <p>4 MS. ZADRA-SYMES: I'm handing you what the</p> <p>5 court reporter has marked as Exhibit 77.</p> <p>6 (Whereupon, Exhibit 77 was marked</p> <p>7 for identification.)</p> <p>8 MS. ZADRA-SYMES: So, just for the record, we</p> <p>9 did not receive any printout from you from the ada.org</p> <p>10 website, so we printed this off. And you'll see on the</p> <p>11 bottom of the page on the left-hand side, it does say</p> <p>12 ada.org/productguide.</p> <p>13 BY MS. ZADRA-SYMES:</p> <p>14 Q. Do you see that?</p> <p>15 A. Yes, I do, uh-huh.</p> <p>16 Q. It appears to be the exact same reference that</p> <p>17 you have in your report?</p> <p>18 A. Let me look.</p> <p>19 Yes.</p> <p>20 Q. So the first product referenced on the</p> <p>21 left-hand side of the page says "BruxZir Crowns and</p> <p>22 Bridges."</p> <p style="text-align: right;">Page 91</p>	<p>1 Q. -- and the vendor is Keller Laboratories.</p> <p>2 A. Yes.</p> <p>3 Q. Do you know if Keller Laboratories is an</p> <p>4 authorized Glidewell lab?</p> <p>5 A. I believe it is.</p> <p>6 Q. Can you tell from this document that it is?</p> <p>7 A. No. I think what you can do is click on their</p> <p>8 website and see if, when they use it, they put the R</p> <p>9 after it, the BruxZir.</p> <p>10 Q. You mean this links to the website?</p> <p>11 A. Or you can just type in another search and find</p> <p>12 the website.</p> <p>13 Q. But do you know if the lab identifies Glidewell</p> <p>14 as --</p> <p>15 A. I don't know as I sit here today.</p> <p>16 Q. Okay. And then still in paragraph 14 on your</p> <p>17 report --</p> <p>18 A. Yes?</p> <p>19 Q. -- the last sentence says, "Further</p> <p>20 investigation suggests that the only individuals who are</p> <p>21 attempting to refer to an all-zirconia crown or bridge</p> <p>22 are those that have either a vested interest in</p> <p style="text-align: right;">Page 93</p>

Pages 90 to 93

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 free riding on the BruxZir name due to their position as</p> <p>2 a market leader, or are in fact selling a finished</p> <p>3 product made from BruxZir materials."</p> <p>4 First of all, what individuals are you talking</p> <p>5 about?</p> <p>6 A. I think I am talking about the people who use</p> <p>7 "BruxZir" in this -- in the printouts that we reference.</p> <p>8 Q. And how --</p> <p>9 A. They're either authorized based on what we were</p> <p>10 able to tell, or they're using it inappropriately.</p> <p>11 Q. When you said "BruxZir," did you mean with a</p> <p>12 Z-i-r?</p> <p>13 A. Of course.</p> <p>14 Q. It's not by referencing the term "all-zirconia</p> <p>15 crown" that they're attempting to free-ride on the --</p> <p>16 A. No, no, no, no, no, no, no. That would be</p> <p>17 a misunderstanding of what I was trying to convey. No.</p> <p>18 The world is free to use the term "all-zirconia crown,"</p> <p>19 including your client. It would be very nice, actually,</p> <p>20 if they'd call it KDA full zirconia crown.</p> <p>21 Q. In paragraph 16 --</p> <p>22 A. Yes?</p> <p style="text-align: right;">Page 94</p>	<p>1 out and verbally meet with labs or dentists and</p> <p>2 verbally -- orally use the word "BruxZir." They have</p> <p>3 marketing materials; they have website materials; that</p> <p>4 most of the advertising materials that Glidewell relies</p> <p>5 on are visual in nature.</p> <p>6 Therefore, the visual appearance of the word is</p> <p>7 significant, and when you are isolating and focusing on</p> <p>8 Glidewell's mark, how it looks is very important. And</p> <p>9 the fact that it has a Z in it is important, and an i,</p> <p>10 both of which letters -- a capital Z and an i, both of</p> <p>11 which letters visually distinguish it from the word</p> <p>12 "bruxer," b-r-u-x-e-r.</p> <p>13 Q. So other than Mr. Shuck, did you talk to</p> <p>14 anybody else about the perception of relevant consumers</p> <p>15 in the marketplace?</p> <p>16 A. Just based on my Internet searches and my PTO</p> <p>17 searches.</p> <p>18 Q. So the answer is no?</p> <p>19 My question is --</p> <p>20 A. Did I talk to anybody --</p> <p>21 Q. -- did you talk to anybody --</p> <p>22 A. -- individuals --</p> <p style="text-align: right;">Page 96</p>
<p>1 Q. -- after referencing the Keating Dental Labs --</p> <p>2 I guess we should start with paragraph 15. So if you'd</p> <p>3 just read paragraph 15 to yourself.</p> <p>4 A. Okay.</p> <p>5 Q. Then I can ask you a question about</p> <p>6 paragraph 16.</p> <p>7 A. Okay.</p> <p>8 Yes?</p> <p>9 Q. So in paragraph 16 you're saying that the</p> <p>10 argument made by Keating Dental Lab that the term</p> <p>11 "BruxZir" is phonetically equivalent to "bruxer,"</p> <p>12 b-r-u-x-e-r, you're saying that that argument is not</p> <p>13 consistent with the way Plaintiff's mark 'BruxZir' is</p> <p>14 used or perceived in the relevant marketplace.</p> <p>15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. How many people did you talk to to establish</p> <p>18 their perception?</p> <p>19 A. I looked at -- I talked to Mr. Shuck about</p> <p>20 people's perception, and one of the things Mr. Shuck</p> <p>21 told me that I think is very significant is that</p> <p>22 Glidewell does not have a sales division where people go</p> <p style="text-align: right;">Page 95</p>	<p>1 Q. Yes.</p> <p>2 A. -- dentists.</p> <p>3 Q. Yes.</p> <p>4 A. I think you asked me all of those things</p> <p>5 before.</p> <p>6 Q. Well, I'm asking it, but for this question</p> <p>7 right here.</p> <p>8 A. I see. No, I already answered the question</p> <p>9 that I didn't talk to dentists or dental labs.</p> <p>10 Q. To establish their perception?</p> <p>11 A. For any reason.</p> <p>12 Q. Did Glidewell give you any discs to review of</p> <p>13 their marketing materials?</p> <p>14 A. As opposed to hard copies?</p> <p>15 THE WITNESS: Mr. Tachner, did you? Yeah.</p> <p>16 Okay. Yes.</p> <p>17 BY MS. ZADRA-SYMES:</p> <p>18 Q. Did you review any discs?</p> <p>19 A. I reviewed their marketing materials, uh-huh.</p> <p>20 Q. So did you review a disc with video recordings</p> <p>21 on it?</p> <p>22 A. I have reviewed video recordings, yes, uh-huh.</p> <p style="text-align: right;">Page 97</p>

Pages 94 to 97

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 Q. Are you aware that those materials, the video</p> <p>2 recordings on the discs, are --</p> <p>3 A. Exist?</p> <p>4 Q. Well, first of all, one question: You're aware</p> <p>5 that they exist; yes?</p> <p>6 A. Yes.</p> <p>7 Q. Are you aware that they are also sent to</p> <p>8 dentists?</p> <p>9 A. I think so, yeah. The exact mechanism by which</p> <p>10 they get to dentists or dental labs, I'm not sure.</p> <p>11 Q. And then on the next page of your report,</p> <p>12 page 13 --</p> <p>13 A. Uh-huh?</p> <p>14 Q. -- you say at the top, "Under United States</p> <p>15 trademark law, a mark should be judged based on its</p> <p>16 sight, sound and meaning (see In Re National Data Corp.,</p> <p>17 753 F.2d 1056), which is a Federal Circuit case from</p> <p>18 1985.</p> <p>19 A. Yes?</p> <p>20 Q. I assume you read that case before you put it</p> <p>21 in your report?</p> <p>22 A. Yes.</p> <p>Page 98</p>	<p>1 likelihood of confusion test. And one of the issues in</p> <p>2 this case is how strong is the Plaintiff's mark and how</p> <p>3 does it appear, and I think it's appropriate to use this</p> <p>4 concept of visual presentation of this mark as part of</p> <p>5 the overall context of determining whether it's generic.</p> <p>6 Q. And again you didn't cite any California cases</p> <p>7 in your report on that point.</p> <p>8 A. I would be happy to give them to you -- or you</p> <p>9 mean Ninth Circuit cases, I think is what you mean.</p> <p>10 Q. Well, you didn't cite California either. This</p> <p>11 is a Federal Circuit case. In fact, this case is</p> <p>12 involving a trademark application in the trademark</p> <p>13 office --</p> <p>14 A. Yes.</p> <p>15 Q. -- is that right?</p> <p>16 A. Yes.</p> <p>17 Q. And then in paragraph 17, you say, "In my</p> <p>18 searches of the USPTO databases and of the relevant</p> <p>19 markets on the Internet, I found no use of 'BruxZir' as</p> <p>20 a slang term by dentists for people who suffer from</p> <p>21 bruxism."</p> <p>22 A. Correct.</p> <p>Page 100</p>
<p>1 Q. So is it your opinion that that case is</p> <p>2 saying to determine whether a mark is generic, you have</p> <p>3 to look at its sight, sound and meaning?</p> <p>4 A. I didn't say that. And, no, it's using the</p> <p>5 sight, sound and meaning test for confusion, but I think</p> <p>6 it's appropriate to use it in this case as well for</p> <p>7 genericism.</p> <p>8 Q. Is that standard in genericness cases to use</p> <p>9 the sight, sound and meaning test for --</p> <p>10 A. It can be, uh-huh.</p> <p>11 Q. But you're not relying on this case for that</p> <p>12 proposition?</p> <p>13 A. I'm relying on this case as a general citation</p> <p>14 to what the sight, sound and meaning test is, and then</p> <p>15 I'm applying that and the principle underlying it to</p> <p>16 this case, and particularly to the genericness issue in</p> <p>17 this case.</p> <p>18 Q. So you're applying a factor from the likelihood</p> <p>19 of confusion test to determine whether or not the mark</p> <p>20 is generic?</p> <p>21 A. The factor can be used in determining mark</p> <p>22 strength and the strength of the Plaintiff's mark in the</p> <p>Page 99</p>	<p>1 Q. Did you search for the term b-r-u-x-e-r as a</p> <p>2 slang term by dentists for people who suffer from</p> <p>3 bruxism?</p> <p>4 A. I'd have to go back and look.</p> <p>5 Q. Would it have made any difference to your</p> <p>6 searching methodology if you were not searching for it</p> <p>7 as a slang term, but as a term of art in the industry?</p> <p>8 A. Let me just think about your question. Would</p> <p>9 it have made any difference to my methodology if I were</p> <p>10 searching for it not as a slang term, but as a term of</p> <p>11 art in the industry?</p> <p>12 No.</p> <p>13 Q. In paragraph 19 you say that in your searches,</p> <p>14 which include your USPTO database searches, you found no</p> <p>15 use of the words "BruxZir" or "bruxer" as a generic name</p> <p>16 of custom-made solid zirconia crowns or as generic name</p> <p>17 of the material that is used to make such crowns.</p> <p>18 A. I see that.</p> <p>19 Q. Is it your opinion that those words would have</p> <p>20 to be found in trademark office descriptions of goods in</p> <p>21 order to be considered generic?</p> <p>22 A. No.</p> <p>Page 101</p>

Pages 98 to 101



10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 Q. You state in the same paragraph at the end, 2 "Instead, the related terms 'brux,' 'bruxism' and 3 'bruxing' have been used predominantly to describe the 4 treatment/prevention of bruxism as a condition via 5 mouth guards, splints, electronic devices, et cetera." 6 A. I see that. 7 Q. Is that what Glidewell's BruxZir product does? 8 Does it treat or prevent bruxism? 9 A. It treats teeth that have been injured by 10 bruxism. It's not a treatment for bruxism in the sense 11 I was talking about here, like a mouth guard, where 12 somebody at night puts a mouth guard in so that the 13 injury to the tooth doesn't occur in the first place. 14 MR. TACHNER: Are we reaching a natural time 15 for -- 16 MS. ZADRA-SYMES: Yeah, that's fine. 17 MR. TACHNER: I mean, it's up to you of course. 18 MS. ZADRA-SYMES: It's fine. It's noon. 19 Can we go off the record? 20 THE VIDEOGRAPHER: Off the record at 12:03 p.m. 21 22 (Whereupon, at 12:03 p.m., the</p> <p style="text-align: right;">Page 102</p>	<p>1 (At 1:29 p.m., the deposition of 2 DAVID J. FRANKLYN was reconvened.) 3 THE VIDEOGRAPHER: And we are back on the 4 record at 1:29 p.m. 5 MS. ZADRA-SYMES: Sir, I'm going to hand you 6 what the court reporter has marked as Exhibit 78. 7 (Whereupon, Exhibit 78 was marked 8 for identification.) 9 MS. ZADRA-SYMES: It's a document that we have 10 produced in this case, and it's labeled KDA-002152 11 through 002160. 12 THE WITNESS: Uh-huh. 13 MS. ZADRA-SYMES: And it is an article taken 14 from the Journal of Oral Rehabilitation, which is the 15 title of a journal. 16 17 EXAMINATION (RESUMED) 18 BY MS. ZADRA-SYMES: 19 Q. Do you see that? 20 A. Yes. 21 Q. And it is dated February 1995. Do you see 22 that?</p> <p style="text-align: right;">Page 104</p>
<p>1 deposition of DAVID J. FRANKLYN was 2 adjourned for noon recess.) 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p> <p style="text-align: right;">Page 103</p>	<p>1 A. I see that. 2 Q. And if you turn to the next page -- 3 A. What page? The second page? 4 Q. Actually, the third page. Second page of the 5 document, third printed page. 6 A. Okay. 7 Q. On the bottom it says No. 145. 8 A. Yes. You mean 154? 9 Q. No, 145. Sorry -- 10 MR. TACHNER: The page number. 11 MS. ZADRA-SYMES: The page number of the actual 12 article. 13 THE WITNESS: Oh, 145. You are right, yes. 14 BY MS. ZADRA-SYMES: 15 Q. The heading of the document says "Effect of 16 working-side interferences on mandibular movement in 17 bruxers and non-bruxers." 18 Do you see that? 19 A. Yes. 20 Q. Am I pronouncing that correctly? 21 A. Which word? 22 Q. "Bruxer"?</p> <p style="text-align: right;">Page 105</p>

Pages 102 to 105

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 A. The word "bruxer" as it's written?</p> <p>2 Q. Yes.</p> <p>3 A. Well, you have an English accent.</p> <p>4 Q. So why don't we have you read it into the</p> <p>5 record just to avoid any issue there.</p> <p>6 Can you read the heading for me, please?</p> <p>7 A. I'd be happy to. "Effect of working-side</p> <p>8 interferences on mandibular movement in bruxers and</p> <p>9 non-bruxers."</p> <p>10 Q. And then in the summary it says, "The effect of</p> <p>11 working interference on bruxers and non-bruxers was</p> <p>12 studied by applying a metal overlay."</p> <p>13 Do you see that?</p> <p>14 A. I do.</p> <p>15 Q. Now, this article was published in 1995. So</p> <p>16 did you do any research regarding dental literature</p> <p>17 relating to bruxism?</p> <p>18 A. Yes.</p> <p>19 Q. And have you read any articles other than what</p> <p>20 is referenced in your report?</p> <p>21 A. No. I have not read this article.</p> <p>22 Q. And other than what is referenced in your</p> <p style="text-align: right;">Page 106</p>	<p>1 symptoms of CMD in bruxers classified by the degree of</p> <p>2 severity."</p> <p>3 Q. In the abstract, in the second sentence it</p> <p>4 says, "211 were classified as bruxers according to the</p> <p>5 use of a questionnaire and clinical examination."</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. Then, "147.39 percent presented clinical</p> <p>9 characteristics of mild bruxers."</p> <p>10 A. I see that.</p> <p>11 Q. And then the next sentence says, "Severe</p> <p>12 bruxers presented the lowest degree of jaw opening."</p> <p>13 A. I see that.</p> <p>14 Q. Do these appear to be slang term use of the</p> <p>15 term "bruxer" to you?</p> <p>16 A. No.</p> <p>17 Q. And in Exhibit 78 that we just reviewed --</p> <p>18 A. This one?</p> <p>19 Q. Yeah.</p> <p>20 A. Yes, ma'am?</p> <p>21 Q. Does the reference to "bruxer" in that journal</p> <p>22 appear to be a reference to a slang term to you?</p> <p style="text-align: right;">Page 108</p>
<p>1 report --</p> <p>2 A. No.</p> <p>3 Q. -- you haven't read any other dental</p> <p>4 literature?</p> <p>5 A. I don't believe so. I'd want to double-check</p> <p>6 that, but...</p> <p>7 MS. ZADRA-SYMES: I'm handing you what the</p> <p>8 court reporter has marked Exhibit No. 79, and I'm trying</p> <p>9 to move fast so that you can get out of here quickly.</p> <p>10 (Whereupon, Exhibit 79 was marked</p> <p>11 for identification.)</p> <p>12 MS. ZADRA-SYMES: This is a document that we</p> <p>13 produced in this case, Exhibit 79. It's marked Document</p> <p>14 No. KDA-002106 through KDA-00218.</p> <p>15 THE WITNESS: Yes?</p> <p>16 BY MS. ZADRA-SYMES:</p> <p>17 Q. Did anybody give you this document to read in</p> <p>18 connection with your report in this case?</p> <p>19 A. I don't believe so.</p> <p>20 Q. Can you read the heading of the article, which</p> <p>21 is on the page No. 268?</p> <p>22 A. "A clinical study of specific signs and</p> <p style="text-align: right;">Page 107</p>	<p>1 A. Which reference?</p> <p>2 Q. Any of the references to "bruxer" or "bruxers."</p> <p>3 A. Well, I haven't read the whole thing, but based</p> <p>4 on the two snippets that you drew my attention to, in</p> <p>5 the context in which they appear, they appear to be used</p> <p>6 as clinical terms.</p> <p>7 Q. But not slang terms?</p> <p>8 A. Correct. I mean, I think something could be</p> <p>9 slang and clinical at the same time, but it's a matter</p> <p>10 of degree as it moves into the language.</p> <p>11 THE WITNESS: Are we done with those two?</p> <p>12 MS. ZADRA-SYMES: Yes. I'm going to hand to</p> <p>13 you what the court reporter has marked as Exhibit 80.</p> <p>14 (Whereupon, Exhibit 80 was marked</p> <p>15 for identification.)</p> <p>16 THE WITNESS: Yes?</p> <p>17 MS. ZADRA-SYMES: It's a document labeled</p> <p>18 KDA-001648 through KDA-001652, which we have produced to</p> <p>19 Glidewell in this case.</p> <p>20 BY MS. ZADRA-SYMES:</p> <p>21 Q. Did anybody give you this document to review in</p> <p>22 connection with your report?</p> <p style="text-align: right;">Page 109</p>

Pages 106 to 109

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 A. Not to the best of my recollection.</p> <p>2 MR. TACHNER: I think this was served after the</p> <p>3 report was created, actually.</p> <p>4 THE WITNESS: Okay. Well, we can still get it</p> <p>5 to me then, can't we?</p> <p>6 MR. TACHNER: Yes.</p> <p>7 THE WITNESS: Then I will review them.</p> <p>8 BY MS. ZADRA-SYMES:</p> <p>9 Q. The abstract on the top of this page after the</p> <p>10 word "Purpose" --"</p> <p>11 A. Yes.</p> <p>12 Q. -- it says, "The aim of the present study was</p> <p>13 to investigate whether bruxers compared to non-bruxing</p> <p>14 individuals apply maladaptive coping strategies."</p> <p>15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. Is that a slang use of the term "bruxer"?</p> <p>18 A. Well, I don't think so because it's in a</p> <p>19 scientific article.</p> <p>20 Q. So, generally, if a term is in a scientific</p> <p>21 article, you would not consider it a slang term?</p> <p>22 A. I would say that as it's used in the article,</p> <p style="text-align: right;">Page 110</p>	<p>1 Q. The title of the article beginning on page</p> <p>2 No. 350.</p> <p>3 A. Yes. It reads as follows: "Comparison of pain</p> <p>4 and quality of life in bruxers and patients with</p> <p>5 myofascial pain of the masticatory muscles."</p> <p>6 Q. And so your opinion would be that that's a</p> <p>7 clinical reference to bruxers and not a slang term?</p> <p>8 A. Yes.</p> <p>9 MS. ZADRA-SYMES: I've handed you what the</p> <p>10 court reporter has marked as Exhibit 82. It's document</p> <p>11 Bates-numbered KDA-001657 through 001661.</p> <p>12 (Whereupon, Exhibit 82 was marked</p> <p>13 for identification.)</p> <p>14 MS. ZADRA-SYMES: This article is titled, "The</p> <p>15 effect of bruxism on periodontal sensation in the molar</p> <p>16 region: A pilot study," and in the middle of the page</p> <p>17 there's a box headed "Clinical Implications."</p> <p>18 BY MS. ZADRA-SYMES:</p> <p>19 Q. Do you see that?</p> <p>20 A. I do.</p> <p>21 Q. It says, "Periodontal sensation is different</p> <p>22 for bruxers relative to non-bruxers, and care should be</p> <p style="text-align: right;">Page 112</p>
<p>1 it's not being used as a slang term.</p> <p>2 Q. And then the next sentence is, "75 sleep</p> <p>3 bruxers and 38 non-bruxers were selected by dental</p> <p>4 examination and tested by a German coping</p> <p>5 questionnaire."</p> <p>6 Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. So, again, that would not be a slang use of the</p> <p>9 term?</p> <p>10 A. It appears to be a clinical use of the term --</p> <p>11 nonslang, clinical use of the term "bruxers."</p> <p>12 MS. ZADRA-SYMES: I'm going to hand you what</p> <p>13 the court reporter has marked as Exhibit 81, and this is</p> <p>14 a document labeled KDA-002048 through KDA-002062.</p> <p>15 (Whereupon, Exhibit 81 was marked</p> <p>16 for identification.)</p> <p>17 BY MS. ZADRA-SYMES:</p> <p>18 Q. Has anybody given you this document to review</p> <p>19 in connection with your report in this case?</p> <p>20 A. I don't believe so.</p> <p>21 Q. Can you read the heading for me, please.</p> <p>22 A. You mean the title?</p> <p style="text-align: right;">Page 111</p>	<p>1 taken when adjusting and correcting occlusal contacts</p> <p>2 for fixed prostheses."</p> <p>3 Do you see that?</p> <p>4 A. I do.</p> <p>5 Q. Is that a slang use of the term "bruxer" or</p> <p>6 "non-bruxer"?</p> <p>7 A. It appears to me to be a clinical use of the</p> <p>8 term "bruxer" and "non-bruxer."</p> <p>9 Did we get a date on this document? July 2007</p> <p>10 I think I'm seeing.</p> <p>11 Q. Yes, there's a reference on the top of page 2.</p> <p>12 It says July 2007.</p> <p>13 A. Yes.</p> <p>14 THE WITNESS: Are we done with that?</p> <p>15 MS. ZADRA-SYMES: Yes.</p> <p>16 I've handed you what the court reporter has</p> <p>17 marked as Exhibit 83, and it's Bates-numbered KDA-001738</p> <p>18 through KDA-001742.</p> <p>19 (Whereupon, Exhibit 83 was marked</p> <p>20 for identification.)</p> <p>21</p> <p>22 BY MS. ZADRA-SYMES:</p> <p style="text-align: right;">Page 113</p>

Pages 110 to 113

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 Q. Has anybody given you this document to review</p> <p>2 in connection with your report in this case?</p> <p>3 A. I don't believe so.</p> <p>4 Q. And the conclusion on the first page --</p> <p>5 A. Yes?</p> <p>6 Q. -- says, "In this study the occurrence of four</p> <p>7 clinical signs, posterior or anterior dental attrition,</p> <p>8 abfractions and occlusal pits, was associated with</p> <p>9 self-reported bruxers. It is suggested that, primarily,</p> <p>10 signs of dental attrition may differentiate</p> <p>11 self-reported bruxers from non-bruxer subjects."</p> <p>12 Do you see that?</p> <p>13 A. I do.</p> <p>14 Q. Is it your opinion that those are not slang</p> <p>15 usages of the term "bruxer" --</p> <p>16 A. Yes.</p> <p>17 Q. -- and "non-bruxer"?</p> <p>18 A. Yes.</p> <p>19 MS. ZADRA-SYMES: So I've just handed you what</p> <p>20 the court reporter has marked as Exhibit 84, and it's</p> <p>21 Document No. KDA-002078 through KDA-002086.</p> <p>22 (Whereupon, Exhibit 84 was marked</p> <p style="text-align: right;">Page 114</p>	<p>1 A. No.</p> <p>2 Q. So it's correct that they are not references to</p> <p>3 a slang use of "bruxer"?</p> <p>4 A. That is correct.</p> <p>5 Q. Thank you.</p> <p>6 MS. ZADRA-SYMES: I just handed you a document</p> <p>7 which has been previously marked in a prior deposition</p> <p>8 as Exhibit 46. It's Document Bates No. KDA-002832</p> <p>9 through 002833, and it's headed at the top "Minnesota</p> <p>10 R form."</p> <p>11 (Whereupon, Exhibit 46 was marked</p> <p>12 for identification.)</p> <p>13 BY MS. ZADRA-SYMES:</p> <p>14 Q. Do you understand what that means, an R form?</p> <p>15 A. Generally.</p> <p>16 Q. What does it mean, generally?</p> <p>17 A. This is an order form.</p> <p>18 Q. Halfway down on the left-hand side, there are</p> <p>19 some products that can be ordered. Do you see that?</p> <p>20 A. Yes, uh-huh.</p> <p>21 Q. There's a reference to an all-zirconia bruxer,</p> <p>22 b-r-u-x-e-r.</p> <p style="text-align: right;">Page 116</p>
<p>1 for identification.)</p> <p>2 THE WITNESS: Yes?</p> <p>3 BY MS. ZADRA-SYMES:</p> <p>4 Q. Has anybody given you this document to review</p> <p>5 in connection with your report in this case?</p> <p>6 A. Not to my recollection.</p> <p>7 Q. Can you read the title of the article, please?</p> <p>8 A. "Electromyographic analysis of the masseter and</p> <p>9 buccinator muscles with the pro-fono facial exerciser</p> <p>10 use in bruxers."</p> <p>11 Q. In the abstract there's a reference to, halfway</p> <p>12 down, "They were divided into a normal control group, a</p> <p>13 bruxer control group without device, and then</p> <p>14 experimental bruxer group who used the device. The</p> <p>15 bruxer group showed a greater masseter EMG amplitude</p> <p>16 when compared to the normal group."</p> <p>17 Do you see that?</p> <p>18 A. I do.</p> <p>19 Q. Now, in your opinion, are those references to a</p> <p>20 slang use of "bruxer" or not?</p> <p>21 A. No.</p> <p>22 Q. They're not?</p> <p style="text-align: right;">Page 115</p>	<p>1 A. Yes.</p> <p>2 Q. In your opinion, is that an attempt to trade up</p> <p>3 the Glidewell BruxZir trademark.</p> <p>4 A. It may be.</p> <p>5 Q. What else would you need to look at to</p> <p>6 determine that?</p> <p>7 A. Any other uses of it by this company.</p> <p>8 Q. Have you reviewed any uses by this company of</p> <p>9 the term "all-zirconia bruxer"?</p> <p>10 A. No.</p> <p>11 MS. ZADRA-SYMES: Just for the record, that is</p> <p>12 b-r-u-x-e-r.</p> <p>13 BY MS. ZADRA-SYMES:</p> <p>14 Q. That's correct?</p> <p>15 A. Oh, you're asking me?</p> <p>16 Q. Yeah.</p> <p>17 A. I thought you were telling her.</p> <p>18 Yes, it is, uh-huh.</p> <p>19 MS. ZADRA-SYMES: Exhibit 85 is one of the</p> <p>20 documents you produced to us.</p> <p>21</p> <p>22 (Whereupon, Exhibit 85 was marked</p> <p style="text-align: right;">Page 117</p>

Pages 114 to 117

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 for identification.)</p> <p>2 BY MS. ZADRA-SYMES:</p> <p>3 Q. It doesn't have Bates numbers on the bottom, so</p> <p>4 I just want to make sure you recognize it as a document</p> <p>5 that you produced to us.</p> <p>6 A. Okay.</p> <p>7 Q. Do you recognize it?</p> <p>8 A. I do.</p> <p>9 MS. ZADRA-SYMES: Just for the record, the</p> <p>10 title of the document is "The metal-free practice scam."</p> <p>11 BY MS. ZADRA-SYMES:</p> <p>12 Q. Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. Is this a document that you reviewed in</p> <p>15 connection with preparing your report?</p> <p>16 A. Yes.</p> <p>17 Q. On the second page in the second full</p> <p>18 paragraph, can you read that for me, please, the</p> <p>19 paragraph beginning with "now"?</p> <p>20 A. "Now, with the advent of full zirconia crowns</p> <p>21 such as Zir-MAX by Burbank Dental Labs and Opalite by</p> <p>22 Aurum Ceramics Labs, we are getting strength and some</p> <p>Page 118</p>	<p>1 A. Okay. I'm going to read it.</p> <p>2 Okay. I've read it.</p> <p>3 Q. Is there any reference to Glidewell?</p> <p>4 A. No.</p> <p>5 Q. Do you know if the two labs referenced in the</p> <p>6 paragraph that I directed your attention to are</p> <p>7 authorized Glidewell labs?</p> <p>8 A. Not off the top of my head. I'd have to go</p> <p>9 back and check on the list.</p> <p>10 Q. Did you check that when you prepared your</p> <p>11 report?</p> <p>12 A. I don't recall if we checked it with this</p> <p>13 particular document or not. As you know, we gave you</p> <p>14 three binders of documents with thousands of pages, so</p> <p>15 I'd have to go back and look.</p> <p>16 Q. Actually, we didn't receive binders. We</p> <p>17 just --</p> <p>18 A. Oh, you just received the drop-box electronic</p> <p>19 delivery. My apologies for stating it that way then.</p> <p>20 MS. ZADRA-SYMES: I've handed you what the</p> <p>21 court reporter has marked as Exhibit 86, which again is</p> <p>22 another document that we received from you on the</p> <p>Page 120</p>
<p>1 beautiful translucency to match some of the all-ceramic</p> <p>2 crowns."</p> <p>3 Q. Is the Glidewell BruxZir product referenced</p> <p>4 anywhere in this article?</p> <p>5 A. I would have to read the whole article to</p> <p>6 answer that question.</p> <p>7 Q. Do you know why you produced this document to</p> <p>8 us?</p> <p>9 A. I think it came up in response to one of our</p> <p>10 searching or digging down in one of our searches,</p> <p>11 uh-huh.</p> <p>12 I should note that the paragraph you had me</p> <p>13 read is using the "full zirconia crowns" as a generic</p> <p>14 term. Wouldn't you agree?</p> <p>15 Q. I don't need to testify today.</p> <p>16 A. I know you don't, but it is.</p> <p>17 Q. But the Glidewell product is not mentioned in</p> <p>18 this article, is it?</p> <p>19 A. I would have to look and see.</p> <p>20 Q. Okay. Well, take your time?</p> <p>21 A. Would you like me to look?</p> <p>22 Q. Yes, please.</p> <p>Page 119</p>	<p>1 production that we received on Wednesday evening this</p> <p>2 week.</p> <p>3 (Whereupon, Exhibit 86 was marked</p> <p>4 for identification.)</p> <p>5 MS. ZADRA-SYMES: The first page of the</p> <p>6 document is titled "Proven winners," and it's a printout</p> <p>7 from the website dentaleconomics.com.</p> <p>8 THE WITNESS: Yes?</p> <p>9 BY MS. ZADRA-SYMES:</p> <p>10 Q. The first paragraph that's numbered, paragraph</p> <p>11 No. 1 says "Full zirconia crowns."</p> <p>12 A. Yes.</p> <p>13 Q. And, again, in the middle of that paragraph, it</p> <p>14 says, "The biggest challenge with full zirconia has been</p> <p>15 esthetics, but this has been solved with such full</p> <p>16 zirconia crowns as Zir-MAX (Burbank Dental Lab) and</p> <p>17 Opalite (Aurum Ceramics)."</p> <p>18 Do you see that?</p> <p>19 A. Yes.</p> <p>20 Q. Did you review this document in connection with</p> <p>21 your report?</p> <p>22 A. I believe so.</p> <p>Page 121</p>

Pages 118 to 121

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 Q. Did you check to see whether those companies</p> <p>2 were authorized Glidewell labs?</p> <p>3 A. Again, I don't recall specifically, although I</p> <p>4 have a vague recollection that Zir-MAX may not be, in</p> <p>5 particular, a Glidewell-authorized lab. I would want to</p> <p>6 double-check that, but I think it's not, Zir-MAX.</p> <p>7 I would note again, they're using "full</p> <p>8 zirconia crowns" as the generic name for these crowns,</p> <p>9 and they don't seem to feel any need to refer to them as</p> <p>10 BruxZir crowns.</p> <p>11 Q. You haven't looked at their website, have you?</p> <p>12 A. Oh, I think we have, yeah. I meant in this</p> <p>13 particular document which you're showing me.</p> <p>14 MS. ZADRA-SYMES: This again is another</p> <p>15 document that was produced to us on Wednesday evening.</p> <p>16 (Whereupon, Exhibit 87 was marked</p> <p>17 for identification.)</p> <p>18 BY MS. ZADRA-SYMES:</p> <p>19 Q. At the bottom of the page there's a reference</p> <p>20 to zirconia-based and full-zirconia restorations.</p> <p>21 A. Uh-huh.</p> <p>22 Q. In the third sentence it says, "They are</p> <p style="text-align: right;">Page 122</p>	<p>1 Q. Turning back to your report on page 13,</p> <p>2 paragraph 16.</p> <p>3 A. Give me a moment, please, and I'll find it.</p> <p>4 Yes.</p> <p>5 Q. In the middle of the paragraph you say,</p> <p>6 "Plaintiff's mark is a composite of the root prefix</p> <p>7 'brux' and the root prefix 'zir.' 'Brux' is taken from</p> <p>8 'bruxism,' and 'zir' is taken from 'zirconium.'"</p> <p>9 A. Yes.</p> <p>10 Q. "Dentists familiar with Plaintiff's services</p> <p>11 and products would likely predominantly perceive its</p> <p>12 marks BruxZir as a combination of these two roots 'brux'</p> <p>13 and 'zir' because it involves the use of solid zirconia</p> <p>14 to treat the results of teeth that have been ground by</p> <p>15 bruxism."</p> <p>16 Do you see that?</p> <p>17 A. I do.</p> <p>18 Q. Did you do any analysis of how dentists</p> <p>19 perceive the term "zir," z-i-r?</p> <p>20 A. I talked to Mr. Shuck about this, and I talked</p> <p>21 to him about the history of how this mark was formed and</p> <p>22 why it is formed the way it is and how the word "zir"</p> <p style="text-align: right;">Page 124</p>
<p>1 rapidly becoming one of the most used types of</p> <p>2 tooth-colored indirect restorations for both single and</p> <p>3 multiple tooth indications. Because of their high</p> <p>4 strength, full-zirconia restorations may be cemented</p> <p>5 with any cement of the practitioner's choice."</p> <p>6 Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. Is there a reference to Glidewell in this</p> <p>9 document?</p> <p>10 A. May I take a moment to look?</p> <p>11 Q. Yes, of course.</p> <p>12 A. Not that I see.</p> <p>13 Did you hear my answer?</p> <p>14 Q. Yes, thank you.</p> <p>15 Two minutes. I just have to pull some other</p> <p>16 documents. I'm going through them as quickly as I can.</p> <p>17 THE VIDEOGRAPHER: Off the record at 1:57 p.m.</p> <p>18 (Recess taken.)</p> <p>19 THE VIDEOGRAPHER: Back on the record</p> <p>20 at 2:05 p.m.</p> <p>21</p> <p>22 BY MS. ZADRA-SYMES:</p> <p style="text-align: right;">Page 123</p>	<p>1 came to be used in this mark, including in connection</p> <p>2 with some early meetings with dentists. I also ran</p> <p>3 "zir" in a search through the U.S. database to see what</p> <p>4 it came up in connection with.</p> <p>5 Q. And from that you determined that dentists</p> <p>6 would likely predominantly perceive the mark "BruxZir"</p> <p>7 as a combination of those two roots; is that correct?</p> <p>8 A. Yes.</p> <p>9 Q. So your understanding is the reference "zir"</p> <p>10 will be perceived by dentists as a reference to</p> <p>11 zirconium?</p> <p>12 A. Predominantly.</p> <p>13 Q. What is the date in this case for determining</p> <p>14 when Glidewell's mark is a strong mark in the legal</p> <p>15 sense?</p> <p>16 A. The date for determining whether Glidewell's</p> <p>17 mark is a strong mark in the legal sense would arguably</p> <p>18 be the same date as used in determining your client's</p> <p>19 entry into the market, which is the day for determining</p> <p>20 whether Glidewell's BruxZir mark was or was not generic</p> <p>21 at that time. So I believe that's August 2011.</p> <p>22 Q. I believe it's actually May 2011, but we can</p> <p style="text-align: right;">Page 125</p>

Pages 122 to 125



10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 check. I'm not testifying.</p> <p>2 On page 14 of your report --</p> <p>3 A. Yes?</p> <p>4 Q. -- you say in paragraph 21 toward the end of</p> <p>5 the paragraph, the last two sentences, "This is not a</p> <p>6 crowded field in which several companies are using a</p> <p>7 mark similar to BruxZir to sell similar products or</p> <p>8 services. A mark that has relatively unique linguistic</p> <p>9 recognition in a given field is a strong mark."</p> <p>10 What's your basis for that?</p> <p>11 A. Well, the USPTO's trademark website and Google</p> <p>12 searches I did are reported earlier in this report, and</p> <p>13 my discussions with Mr. Shuck to see who besides the</p> <p>14 Plaintiff and the Defendant in this case use any mark</p> <p>15 that is similar to "BruxZir" or "bruxer" as a trademark</p> <p>16 for these two types of products or services, either the</p> <p>17 making of the crowns, the crowns, or the making of the</p> <p>18 blank material.</p> <p>19 Q. Anything else?</p> <p>20 A. No.</p> <p>21 Q. What do you mean by "relatively unique</p> <p>22 linguistic recognition"?</p> <p>Page 126</p>	<p>1 a wide-scale sense, then it would be perhaps fanciful.</p> <p>2 But it's not really fanciful. It's a word that exists</p> <p>3 in the English language that was slightly misspelled and</p> <p>4 then arbitrarily applied to a field which is largely</p> <p>5 remote from the meaning of the numerical word.</p> <p>6 Now, an argument could be made, being a</p> <p>7 professor, that it's a suggestive mark because it</p> <p>8 suggests -- this is what the founder of Google said in a</p> <p>9 newspaper interview. He said, "We picked the mark to</p> <p>10 suggest the connection between the viewer of the number,</p> <p>11 which has all these zeros after it, the way the number</p> <p>12 would appear if it were written out, and the word</p> <p>13 'googol' that simplifies the number. And so we were</p> <p>14 trying to say, we simplify the massive data on the</p> <p>15 Internet in the way that word simplifies that number,"</p> <p>16 which is a very tortured and math geek explanation. To</p> <p>17 mathematicians I would say it would suggest it; to the</p> <p>18 general population, I don't think they would have gotten</p> <p>19 that.</p> <p>20 Q. And the question of suggestiveness is</p> <p>21 determined according to what the relevant consuming</p> <p>22 public understands?</p> <p>Page 128</p>
<p>1 A. Well, I mean a mark that is linguistically</p> <p>2 unique or relatively unique tends to be stronger in it's</p> <p>3 given field. For example, Google is the only</p> <p>4 search engine that sounds like "Google." If there were</p> <p>5 13 search engines that sounded like goog-something, then</p> <p>6 Google wouldn't be relatively linguistically unique in</p> <p>7 the search engine services market as a mark.</p> <p>8 So there are other areas where you find marks</p> <p>9 that are not relatively linguistically unique, where</p> <p>10 lots of competitors use the same mark or very similar</p> <p>11 marks to each other to sell very similar products, and</p> <p>12 in that sense you would say it's not a very unique mark.</p> <p>13 Q. Is Google a suggestive mark?</p> <p>14 A. Google is a misspelling of the word "googol,"</p> <p>15 which is a mathematical term that refers to a very large</p> <p>16 number. I forgot what the number is, but it's like 10</p> <p>17 with a hundred zeros after it. "Google" is probably</p> <p>18 perceived by the public as arbitrary or even fanciful.</p> <p>19 Most the time when I ask my students if they</p> <p>20 know what Google is, they don't even know what it is for</p> <p>21 the number, and they assume Google just invented this</p> <p>22 mark. If that were proven to be the case in a survey in</p> <p>Page 127</p>	<p>1 A. Absolutely, yes. To the perception of the</p> <p>2 relevant public.</p> <p>3 Let me just add though, by the way, with</p> <p>4 genericness --</p> <p>5 Q. I haven't asked a question about genericness.</p> <p>6 A. Well, shall I wait?</p> <p>7 Q. Yes, you shall.</p> <p>8 A. Will you ask me?</p> <p>9 Q. I asked whether Google was suggestive, and I</p> <p>10 had a very long answer. Thank you very much.</p> <p>11 A. I apologize for the very long answer. It's not</p> <p>12 clear. I would suspect it's not, but an argument could</p> <p>13 be made that it is.</p> <p>14 Q. Is it your opinion that because Glidewell is a</p> <p>15 market leader, other companies cannot use a generic term</p> <p>16 in the names of their products?</p> <p>17 A. I don't think I've said that.</p> <p>18 Q. So that's not your opinion?</p> <p>19 A. What other companies? What generic terms? In</p> <p>20 the names of what products? The question is entirely</p> <p>21 nonspecific to this case.</p> <p>22 Q. In your report, paragraph 23 --</p> <p>Page 129</p>

Pages 126 to 129

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

1 A. Yes?  
2 Q. -- you say, "As stated above, Glidewell is the  
3 market leader in the provision of custom-made solid  
4 zirconia crowns. A review of Keating's website reveals  
5 that it is in the same market."  
6 A. Yes.  
7 Q. So is it your opinion that because Glidewell is  
8 the market leader in the provision of custom-made solid  
9 zirconia crowns, Keating cannot use a generic term in  
10 the name of its products?  
11 A. I'm not saying that there, and that's not the  
12 opinion I'm stating there. The opinion I'm stating  
13 there is that they're in the same market.  
14 Q. Okay. So is it your opinion that Keating  
15 Dental can use a generic term "bruxer" in the name of  
16 its product?  
17 A. Oh, "bruxer"?  
18 Q. Which is admittedly a generic term in this  
19 case.  
20 A. Who admitted it?  
21 Q. Glidewell.  
22 A. Well, I would want to look at how it's being  
Page 130

1 used and when it's being used. I didn't admit it in  
2 this deposition.  
3 Q. It's an admission in this case that the term  
4 "bruxer" is generic for people who suffer from bruxism.  
5 A. Oh, I see. Well, it's not necessarily being  
6 used in a generic sense by Keating, even if it's a  
7 generic word. "Apple" is generic for apples, but when  
8 you stick it on a computer company, it's no longer  
9 generic. "Bruxer" could be the generic name of a person  
10 who bruxes, but unless Keating is selling those  
11 people -- I don't think they have bruxers that you  
12 order, you know, you say, "Send me a bruxer" -- then  
13 they're not using it as a generic term.  
14 Q. Are they using it descriptively?  
15 A. I think that they're using it suggestively.  
16 They can't be using it descriptively because they're  
17 using it in their trademark. For descriptive fair use  
18 you don't use it in your trademark.  
19 Q. That's your opinion, that it's not possible to  
20 do?  
21 A. That's the law.  
22 Q. Okay.  
Page 131

1 A. The law is that if you want to take advantage  
2 of descriptive fair use, you don't use it as a brand  
3 name, and Keating is using it as a brand name.  
4 Q. Are you saying that people don't use  
5 descriptive terms in their trademarks?  
6 A. One they do, they're no longer considered to be  
7 using them descriptively. They're considered to be  
8 using them as source identifiers.  
9 Q. And if somebody disclaims the use of a term in  
10 their trademark, would that indicate that it's  
11 descriptive?  
12 A. I saw that they disclaimed the use of it, and  
13 that -- could be a lot of reasons for that, but that  
14 doesn't mean that it's not still part of the composite  
15 mark for which they were seeking protection.  
16 Q. So are you saying that when somebody files a  
17 trademark application that includes descriptive words,  
18 they are necessarily claiming full trademark rights in  
19 those descriptive words even if they disclaim them?  
20 A. No.  
21 Q. So it is possible to use a descriptive term in  
22 a trademark without it being used in a trademark sense?  
Page 132

1 A. I think it's theoretically possible. I don't  
2 know that Keating is using it in a descriptive sense in  
3 its trademark.  
4 Q. But you haven't spoken to any dentist to  
5 determine how they perceived that use?  
6 A. We've already established, Ms. Symes, that I  
7 have not spoken to any dentists about anything other  
8 than my own teeth and my own bruxer crown.  
9 MS. ZADRA-SYMES: Let's just take five minutes.  
10 We're getting close to the end, so...  
11 THE VIDEOGRAPHER: Off the record at 2:19 p.m.  
12 (Recess taken.)  
13 THE VIDEOGRAPHER: Back on the record at  
14 2:26 p.m.  
15 BY MS. ZADRA-SYMES:  
16 Q. In connection with your report in this case,  
17 have you done any studies to determine how a dentist  
18 perceives the letter Z in connection with marks for  
19 zirconia crowns?  
20 A. Not other than what I've stated in the report  
21 and what I've told you previously.  
22 Q. Okay. In paragraph 24 of your report --  
Page 133

Pages 130 to 133

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 A. Yes?</p> <p>2 Q. -- towards the top of the page, you have a</p> <p>3 sentence that says, "By adding a Z, the Keating mark</p> <p>4 causes a mental association with the Z in Glidewell's</p> <p>5 BruxZir mark."</p> <p>6 A. Yes.</p> <p>7 Q. What's your basis for that statement?</p> <p>8 A. Well, the Z is a prominent part in the BruxZir</p> <p>9 mark. It's capitalized, and it makes a distinct visual</p> <p>10 impression on the person who sees it. It's my</p> <p>11 understanding that Keating's name is -- or was Keating</p> <p>12 Dental Arts. I would have expected them to call their</p> <p>13 product, therefore, if they were seeking to abbreviate</p> <p>14 their name, Keating KDA Bruxer, B-r-u-x-e-r, if they</p> <p>15 were going to go down that route, but instead they</p> <p>16 called it KDZ Bruxer.</p> <p>17 Q. So --</p> <p>18 A. It seems to me that once they add the Z to the</p> <p>19 list of alphabetical symbols that precede the rest of</p> <p>20 the mark, they attempt to call attention to it in a way</p> <p>21 that could very well cause confusion with Glidewell's</p> <p>22 mark and which could very well trade on the goodwill and</p> <p style="text-align: right;">Page 134</p>	<p>1 extra copies of it. I'm just pulling out a couple of</p> <p>2 pages here. It was printed on, according to the report</p> <p>3 that we received, October 9, 2012.</p> <p>4 MR. TACHNER: That's probably the date you</p> <p>5 downloaded it and printed it.</p> <p>6 MS. ZADRA-SYMES: It was the date it was given</p> <p>7 to us.</p> <p>8 MR. TACHNER: Well, we gave it to you</p> <p>9 electronically. It wasn't printed.</p> <p>10 MS. ZADRA-SYMES: Oh, I know you gave it to us</p> <p>11 electronically, but I'm telling you when it was printed.</p> <p>12 We printed it when we received it.</p> <p>13 MR. TACHNER: All right.</p> <p>14 MS. ZADRA-SYMES: I'm trying to find -- there's</p> <p>15 no Bates numbers on anything, so I pulled out one of the</p> <p>16 marks here from the TESS report, and it's for Zira,</p> <p>17 Z-i-r-a, full-contour zirconia. We could maybe make</p> <p>18 that one as an exhibit, and then I will make copies of</p> <p>19 it afterwards. I'll just show you that one for now.</p> <p>20 (Whereupon, Exhibit 88 was marked</p> <p>21 for identification.)</p> <p>22 THE WITNESS: Can I look at it?</p> <p style="text-align: right;">Page 136</p>
<p>1 fame of Glidewell's BruxZir mark.</p> <p>2 Q. So when you reference mental association in</p> <p>3 this sentence, you're talking about your own mental</p> <p>4 association?</p> <p>5 A. No, I'm not.</p> <p>6 Q. But you --</p> <p>7 A. Mental association, as you know, is often</p> <p>8 studied by way of inference in trademark cases, and many</p> <p>9 judges with no survey evidence whatsoever accept</p> <p>10 testimony of and make statements about likely mental</p> <p>11 associations.</p> <p>12 Q. But you are aware that there are numerous</p> <p>13 trademarks in the dental industry that use a capital</p> <p>14 letter Z in connection with a product that includes</p> <p>15 zirconia?</p> <p>16 A. But not with "bruxer" in the trademark that I</p> <p>17 found. I found no other companies besides these two</p> <p>18 that combine "Z" and "bruxer" in any phonetic</p> <p>19 pronunciation thereof as part of their trademark.</p> <p>20 Q. In the cert report that was produced to us on</p> <p>21 Wednesday evening, which appears to be over a thousand</p> <p>22 pages -- I have a copy in front of me, but I didn't make</p> <p style="text-align: right;">Page 135</p>	<p>1 MS. ZADRA-SYMES: Yes, surely. This is it.</p> <p>2 We've marked it as Exhibit 88, and again we're all</p> <p>3 sharing one copy.</p> <p>4 THE WITNESS: Yes, I'll hold it up like this,</p> <p>5 if I can, if you can read it.</p> <p>6 BY MS. ZADRA-SYMES:</p> <p>7 Q. It's Zira, Z-i-r-a, full-contour zirconia, and</p> <p>8 you've previously testified today that "full-contour</p> <p>9 zirconia" is a generic term for crowns that include</p> <p>10 zirconia; is that correct?</p> <p>11 A. Yes.</p> <p>12 Q. Is that generic term referenced anywhere in the</p> <p>13 description of goods for that mark?</p> <p>14 A. Well, the word "zirconia" is.</p> <p>15 I don't believe this is a registered mark. It</p> <p>16 says, "Published for opposition."</p> <p>17 Q. But the --</p> <p>18 MR. TACHNER: It's got a registration number.</p> <p>19 THE WITNESS: Where is the registration number?</p> <p>20 MR. TACHNER: On the bottom.</p> <p>21 THE WITNESS: Oh, yeah, "Registration Number."</p> <p>22 I'm sorry. Yes, go ahead.</p> <p style="text-align: right;">Page 137</p>

Pages 134 to 137

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 So what's your question?</p> <p>2 MS. ZADRA-SYMES: Can you read it back, please.</p> <p>3 (Record read as follows:</p> <p>4 "Question: Is that generic term</p> <p>5 referenced anywhere in the description</p> <p>6 of goods for that mark?")</p> <p>7 THE WITNESS: Part of it is.</p> <p>8 BY MS. ZADRA-SYMES:</p> <p>9 Q. The word "zirconia"?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. Can you pass that back, please.</p> <p>12 A. Sure.</p> <p>13 Q. And you'll see on the back page --</p> <p>14 A. Oh, I didn't look at the back page.</p> <p>15 Yes.</p> <p>16 Q. -- that there's a disclaimer.</p> <p>17 A. I do see that.</p> <p>18 Q. And what does that indicate?</p> <p>19 A. "No claim is made to the exclusive right to use</p> <p>20 'full-contour zirconia' apart from the mark as shown."</p> <p>21 Q. Why is that disclaimer made?</p> <p>22 A. So that they can't sue somebody else who uses</p> <p style="text-align: right;">Page 138</p>	<p>1 A. I think so, yes.</p> <p>2 I'm not sure I said it in those words. I said</p> <p>3 "full zirconia crown" was. Let me just look at my</p> <p>4 report before I give you an answer that's not consistent</p> <p>5 with what in fact I did say before.</p> <p>6 Would you let me do that for a moment?</p> <p>7 Q. Of course.</p> <p>8 A. Do you want to repeat your question?</p> <p>9 Q. The question was, is it your opinion that the</p> <p>10 term "full zirconia" is a generic term in connection</p> <p>11 with dental appliances that include zirconia?</p> <p>12 A. It may be.</p> <p>13 Q. Okay. And what I've handed you is one of the</p> <p>14 pages from your TESS printout, and that is firm mark</p> <p>15 called Suntech full zirconia.</p> <p>16 A. Yes.</p> <p>17 Q. It does not appear to be registered --</p> <p>18 A. Correct.</p> <p>19 Q. -- but there is a disclaimer on the back --</p> <p>20 A. Yes.</p> <p>21 Q. -- of "full-contour."</p> <p>22 A. No.</p> <p style="text-align: right;">Page 140</p>
<p>1 the term "full-contour zirconia."</p> <p>2 Q. So what's the trademark here in this?</p> <p>3 A. It's the whole thing.</p> <p>4 Q. Okay.</p> <p>5 A. That disclaimer doesn't take that out of the</p> <p>6 trademark. It just qualifies their rights.</p> <p>7 Q. It also indicates that other people can use</p> <p>8 those disclaimed terms in their marks too?</p> <p>9 A. Separately, in a nonconfusing way.</p> <p>10 Q. And also in other trademarks?</p> <p>11 A. Yes.</p> <p>12 MS. ZADRA-SYMES: Here's another one. I'm</p> <p>13 going to hand you what the court reporter has marked as</p> <p>14 Exhibit 89. It is a printout of the TESS report that</p> <p>15 you produced to us referencing the Suntech full zirconia</p> <p>16 trademark.</p> <p>17 (Whereupon, Exhibit 89 was marked</p> <p>18 for identification.)</p> <p>19 BY MS. ZADRA-SYMES:</p> <p>20 Q. And again, you testified earlier today that</p> <p>21 "full zirconia" was a generic name; is that correct?</p> <p>22 "Full zirconia crown"?</p> <p style="text-align: right;">Page 139</p>	<p>1 Q. Sorry.</p> <p>2 A. "Full zirconia."</p> <p>3 Q. "Full zirconia."</p> <p>4 A. Would you like me to read it?</p> <p>5 Q. Yes, please.</p> <p>6 A. "No claim is made to the exclusive right to use</p> <p>7 'full zirconia' apart from the mark as shown."</p> <p>8 Q. So that would be an indication that the company</p> <p>9 is not claiming rights in the words "full zirconia"?</p> <p>10 A. Standing alone.</p> <p>11 Q. Standing alone?</p> <p>12 A. Only in connection with the word "Suntech"</p> <p>13 coming before it.</p> <p>14 Q. Yes. Thank you.</p> <p>15 The description of goods in that application,</p> <p>16 does it reference "full zirconia"?</p> <p>17 A. It does not.</p> <p>18 Q. Do you know how dentists order dental crowns</p> <p>19 from a dental lab?</p> <p>20 A. They fill out a form, and they check off what</p> <p>21 they want. I suppose it varies from lab to lab. I've</p> <p>22 seen some of the forms produced in this litigation by</p> <p style="text-align: right;">Page 141</p>

Pages 138 to 141

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 your client which indicate how they order.</p> <p>2 Q. Does that form have the Keating Dental</p> <p>3 Associates [sic] name at the top?</p> <p>4 A. I believe so.</p> <p>5 Q. We already established that you didn't have any</p> <p>6 discussions with any dentists, so if a dentist was very</p> <p>7 well aware that it was purchasing a product from Keating</p> <p>8 Dental Associates and not from Glidewell, would that</p> <p>9 indicate that the dentist was confused?</p> <p>10 A. Is that a hypothetical question?</p> <p>11 Q. Yes.</p> <p>12 A. If the dentist was aware that it was purchasing</p> <p>13 a product from Keating and not from Glidewell, would it</p> <p>14 indicate that the dentist was confused about what?</p> <p>15 Q. About the source of the product it was</p> <p>16 purchasing.</p> <p>17 A. It could still indicate confusion as to source.</p> <p>18 Q. And how would it do that?</p> <p>19 A. The dentist might not know that -- well, in my</p> <p>20 understanding, Keating Dental Arts does not sell blanks;</p> <p>21 correct? It's correct. They sell finished crowns. If</p> <p>22 the dentist is looking for a finished crown, he or she</p> <p style="text-align: right;">Page 142</p>	<p>1 that inference is reasonable given that evidence; that a</p> <p>2 court of law would like at that as prima facie evidence</p> <p>3 of actual confusion, or could.</p> <p>4 Q. But if a dentist was aware that the product did</p> <p>5 not come from Glidewell and that the material for making</p> <p>6 the crown did not come from Glidewell, would they still</p> <p>7 be confused?</p> <p>8 A. You mean that the material was not real BruxZir</p> <p>9 material from Glidewell?</p> <p>10 Q. From Glidewell, exactly.</p> <p>11 A. I would think not. I would think in those</p> <p>12 circumstances, they would not be confused.</p> <p>13 Q. Who are Glidewell's major competitors?</p> <p>14 A. Well, I think it depends on whether you're</p> <p>15 talking about for the blanks or for the labs. Let's</p> <p>16 start with the blanks. Who makes this strength of --</p> <p>17 who makes this strength? I did get this information. I</p> <p>18 specifically asked Mr. Shuck for this information, and</p> <p>19 I'm trying to see if I can remember the names of some of</p> <p>20 these competitors.</p> <p>21 I think Zir-MAX is a competitor. I think</p> <p>22 Zir-Cast is a competitor. I think Lava Plus is a</p> <p style="text-align: right;">Page 144</p>
<p>1 could think that Keating is an authorized lab selling</p> <p>2 authorized BruxZir material in its crowns. So the mere</p> <p>3 fact that the dentist knows it's dealing with a lab</p> <p>4 doesn't mean that the dentist knows it's not getting a</p> <p>5 real BruxZir crown.</p> <p>6 Q. Is it your understanding that the only zirconia</p> <p>7 material available for making full zirconia crowns comes</p> <p>8 from Glidewell?</p> <p>9 A. No.</p> <p>10 Q. Is it your understanding that the only material</p> <p>11 for making full zirconia crowns for bruxers comes from</p> <p>12 Glidewell?</p> <p>13 A. No. There could still be confusion because</p> <p>14 they could think it was Glidewell's?</p> <p>15 Q. You haven't asked any of them though, have you?</p> <p>16 A. I've seen evidence in your order forms of them</p> <p>17 writing "BruxZir" with a capital Z, which seems to</p> <p>18 indicate at least the inference that some of them could</p> <p>19 very well have believed that that was authorized</p> <p>20 Glidewell BruxZir material used.</p> <p>21 Q. But you've made that assumption?</p> <p>22 A. I haven't made that assumption. I have said</p> <p style="text-align: right;">Page 143</p>	<p>1 competitor; I think it's made by 3M, and they make the</p> <p>2 blanks, Lava Plus. I think NexxZr, spelled</p> <p>3 N-e-x-Z-r [sic], may make the blanks as well.</p> <p>4 Those are some of the names I recall being</p> <p>5 given on Glidewell competitors for the material.</p> <p>6 Q. And then for the actual crowns?</p> <p>7 A. Well, the crowns is almost too numerous to</p> <p>8 mention because the crowns are made by unauthorized --</p> <p>9 well, independent -- let's just say unassociated,</p> <p>10 unaffiliated dental labs throughout the United States,</p> <p>11 of which there are many. Many, many, many.</p> <p>12 It is my understanding that Glidewell is the</p> <p>13 largest single lab. I do not know who the second- and</p> <p>14 third-largest single labs are for making the crowns.</p> <p>15 Q. And do you know when the many independent labs</p> <p>16 began making those crowns?</p> <p>17 A. I don't know the precise dates. I know that --</p> <p>18 or I've been told that full zirconia crowns were not</p> <p>19 widely made and sold throughout the United States before</p> <p>20 Glidewell's marketing and promotion of them increased in</p> <p>21 the overall sales of them.</p> <p>22 Q. So have you determined since June of 2009 how</p> <p style="text-align: right;">Page 145</p>

Pages 142 to 145

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 many of these many independent labs began making full 2 zirconia crowns since 2009? 3 A. I don't have a precise number, no. 4 Q. Are you aware of any instances where a customer 5 has ordered a KDZ Bruxer product from Glidewell? 6 A. No, not off the top of my head. I'm aware of 7 the opposite. I believe you produced instances of 8 50 orders of BruxZir products from Keating. 9 Q. That's what you're saying they are, but... 10 A. Well, it says it on there with a Z. 11 Q. Then are you aware of any customer making any 12 inquiries with Glidewell to order a KDZ Bruxer product? 13 A. No. 14 Q. Are you aware of any instances where a 15 KDZ Bruxer product has been returned to Glidewell? 16 A. No, I'm not aware of any. 17 MS. ZADRA-SYMES: If we take another short 18 break, I think we're getting close to done. 19 THE WITNESS: Okay. 20 THE VIDEOGRAPHER: Off the record at 2:48 p.m. 21 (Recess taken.) 22 THE VIDEOGRAPHER: Back on the record</p> <p style="text-align: right;">Page 146</p>	<p>1 THE WITNESS: Yes. 2 MS. ZADRA-SYMES: At the top it says "CDL 3 Veneers - Products - ZerisBRUX," Z-e-r-i-s-B-R-U-X, and 4 then there's a photograph of a lady towards the middle 5 of the page. Next to that it says ZerisBRUX with a 6 circle R, and underneath it says "Full-Contour Zirconia 7 Restorations." 8 BY MS. ZADRA-SYMES: 9 Q. Do you see that? 10 A. I do. 11 Q. Are you familiar with this product? 12 A. No. 13 Q. Is this an attempt to trade on the Glidewell 14 mark? 15 A. I don't know. I haven't done an investigation 16 of this. 17 Q. Based on what you see on this website printout, 18 would you infer that it is an attempt -- 19 A. They're not using the word "bruxer," and 20 "Zeris" is fairly distinct. I don't know. I'm not here 21 to make a trademark analysis of whether Glidewell would 22 have a claim against these people and, if so, what would</p> <p style="text-align: right;">Page 148</p>
<p>1 at 2:55 p.m. 2 MS. ZADRA-SYMES: I handed you what the 3 court reporter has marked as Exhibit 90 and Exhibit 91. 4 (Whereupon, Exhibit 90 was marked 5 for identification.) 6 (Whereupon, Exhibit 91 was marked 7 for identification.) 8 MS. ZADRA-SYMES: So turning first to 9 Exhibit 90, this is a document that we produced. It 10 doesn't have a Bates number at the bottom. 11 MR. MANGUM: We haven't produced it yet. 12 MS. ZADRA-SYMES: Oh, so it will be produced. 13 THE WITNESS: It's not yet been produced in 14 this litigation? 15 MS. ZADRA-SYMES: No, it has not been produced 16 yet. No. But it will be. 17 THE WITNESS: So I'm the first person to see 18 it? 19 MS. ZADRA-SYMES: You may very well be. 20 THE WITNESS: I'm honored. 21 MS. ZADRA-SYMES: It's a printout from 22 www.cdllab.com.</p> <p style="text-align: right;">Page 147</p>	<p>1 be the strengths and weaknesses up one side and down the 2 other and all the arguments that could be made by both 3 sides and whether this could create a likelihood of 4 confusion in the relevant marketplace. I would really 5 have to make a much greater investigation to give you a 6 meaningful opinion. 7 Q. You do agree that this has a capital Z at the 8 beginning of the mark; is that correct? 9 A. It does, yes. I think my testimony earlier was 10 that there was no mark that had "bruxer" and a Z other 11 than your client's and Glidewell's. 12 Q. But this has a capital Z and the word "brux"? 13 A. Yes, but not "bruxer." 14 Q. Okay. 15 A. Well, "bruxer" is a lot like "BruxZir" in the 16 sense that it's two syllables; this is one syllable. 17 Q. How many -- 18 A. You know, it's possible that people -- other 19 people trade on other people's goodwill, and that 20 doesn't mean that somehow it absolves your client from 21 liability, nor am I here -- 22 Q. That wasn't my question.</p> <p style="text-align: right;">Page 149</p>

Pages 146 to 149



10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<p>1 A. I know that, but nor am I here to give</p> <p>2 thorough, you know, reviews of the potential trademark</p> <p>3 claims and defenses of every single thing that you can</p> <p>4 find with the word "brux" on the Internet.</p> <p>5 Q. But you have prepared a report that purports to</p> <p>6 have done an investigation of the products that are in</p> <p>7 the marketplace, and this is one of the products in the</p> <p>8 marketplace, so that's why I put it in front of you.</p> <p>9 A. I appreciate that, and I --</p> <p>10 Q. Okay. So we can turn to Exhibit 91 now.</p> <p>11 A. Okay.</p> <p>12 Q. This is a document that has been produced.</p> <p>13 It's numbered KDA-002172.</p> <p>14 A. Yes.</p> <p>15 Q. And there's a reference in two places to a --</p> <p>16 the first reference, slightly more than halfway down the</p> <p>17 page, says "Posterior Single Units."</p> <p>18 A. Uh-huh.</p> <p>19 Q. It says, Use Procera Zirconia or Bruxer crown</p> <p>20 made from IPS e.max."</p> <p>21 Do you see that?</p> <p>22 A. Yes, I do.</p> <p style="text-align: right;">Page 150</p>	<p>1 Mr. Tachner, to whom I put several questions that I</p> <p>2 wanted asked of Mr. Shuck.</p> <p>3 Q. So other than speaking with Mr. Tachner, you</p> <p>4 didn't have any other contact with anybody at Glidewell</p> <p>5 prior to preparing your report?</p> <p>6 A. Correct.</p> <p>7 MS. ZADRA-SYMES: I think that I don't have any</p> <p>8 questions today, but as we've discussed, we reserve the</p> <p>9 right to continue this deposition because of the</p> <p>10 apparent missing documents or documents that may be</p> <p>11 missing that the witness has relied upon for his report,</p> <p>12 and also because of the volume of the documents that we</p> <p>13 only received on Wednesday evening despite requests that</p> <p>14 they be produced earlier and despite the federal rules</p> <p>15 obligation.</p> <p>16 MR. TACHNER: I don't recall ever getting a</p> <p>17 request that they be produced earlier than Wednesday.</p> <p>18 The first time you asked for them was when I got an</p> <p>19 e-mail from either Rustin or David saying, "Please</p> <p>20 produce these by Wednesday."</p> <p>21 MS. ZADRA-SYMES: Because they hadn't been</p> <p>22 produced pursuant to the obligations under the federal</p> <p style="text-align: right;">Page 152</p>
<p>1 Q. Is that a Glidewell-authorized company?</p> <p>2 A. I don't know.</p> <p>3 Q. And then there's another reference to the same</p> <p>4 product further down, "Use IPS e.max Bruxer crown."</p> <p>5 A. I see that.</p> <p>6 Q. Okay. So in your research regarding the</p> <p>7 marketplace you didn't come across this product?</p> <p>8 A. No.</p> <p>9 Q. You mentioned that the only person that you've</p> <p>10 met with at Glidewell was Jim Shuck?</p> <p>11 A. Yes.</p> <p>12 Q. How many meetings have you had with Jim Shuck?</p> <p>13 A. One.</p> <p>14 Q. When was that?</p> <p>15 A. Within the last week.</p> <p>16 Q. So had you spoken with Mr. Shuck by telephone</p> <p>17 prior to that meeting?</p> <p>18 A. No.</p> <p>19 Q. So prior to preparing your report, which was</p> <p>20 signed on September 15, did you have any discussions</p> <p>21 with Jim Shuck?</p> <p>22 A. I don't think so. I think I spoke with</p> <p style="text-align: right;">Page 151</p>	<p>1 rules. You didn't ask us to produce our expert</p> <p>2 exhibits; we just did because that's the federal rule</p> <p>3 obligation.</p> <p>4 MR. TACHNER: Your expert's what?</p> <p>5 MS. ZADRA-SYMES: Documentation that he relied</p> <p>6 upon in connection with his report.</p> <p>7 So with that reservation, I'm going to finish</p> <p>8 my questions for today.</p> <p>9 MR. TACHNER: Okay. I have no questions.</p> <p>10 MS. ZADRA-SYMES: Thank you.</p> <p>11 THE VIDEOGRAPHER: All right. Off the record</p> <p>12 at 3:02 p.m.</p> <p>13 (At 3:02 p.m., the deposition of</p> <p>14 DAVID J. FRANKLYN was adjourned.)</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p style="text-align: right;">Page 153</p>

Pages 150 to 153

10/12/2012

James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

<div><div>1 STATE OF CALIFORNIA ) 2 COUNTY OF LOS ANGELES ) SS. 3 4 I, AUDRA E. CRAMER, CSR No. 9901, in and for the State of California, do hereby certify: 5 That, prior to being examined, the witness named in the foregoing deposition was by me duly sworn to 6 testify the truth, the whole truth and nothing but the truth; 7 That said deposition was taken down by me in shorthand at the time and place therein named, and 8 thereafter reduced to typewriting under my direction, and the same is a true, correct and complete transcript 9 of said proceedings; I further certify that I am not interested in the 10 event of the action. 11 Witness my hand this 31st day of October, 12 2012. 13 14 15 16 17 18 19 20 21 22</div><div><div>Certified Shorthand Reporter for the State of California</div><div>Page 154</div></div></div> <td><div><div>1 Digital Evidence Group, L.L.C. 2 1726 M Street NW, Suite 1010 3 Washington, D.C. 20036 4 (202) 232-0646 5 6 SIGNATURE PAGE 7 8 9 Case: James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc Witness Name: David J. Franklyn Deposition Date: October 12, 2012 10 11 I do hereby acknowledge that I have read and examined the foregoing pages of the transcript of my deposition and that: 12 13 (Check appropriate box): 14 ( ) The same is a true, correct and complete transcription of the answers given by me to the questions therein recorded. 15 ( ) Except for the changes noted in the 16 attached Errata Sheet, the same is a true, correct and complete transcription of the 17 answers given by me to the questions therein 18 recorded. 19 20 21 22</div><div><div>DATE WITNESS SIGNATURE</div><div>Page 156</div></div></div></td>	<div><div>1 Digital Evidence Group, L.L.C. 2 1726 M Street NW, Suite 1010 3 Washington, D.C. 20036 4 (202) 232-0646 5 6 SIGNATURE PAGE 7 8 9 Case: James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc Witness Name: David J. Franklyn Deposition Date: October 12, 2012 10 11 I do hereby acknowledge that I have read and examined the foregoing pages of the transcript of my deposition and that: 12 13 (Check appropriate box): 14 ( ) The same is a true, correct and complete transcription of the answers given by me to the questions therein recorded. 15 ( ) Except for the changes noted in the 16 attached Errata Sheet, the same is a true, correct and complete transcription of the 17 answers given by me to the questions therein 18 recorded. 19 20 21 22</div><div><div>DATE WITNESS SIGNATURE</div><div>Page 156</div></div></div>
<div><div>1 David J. Franklyn c/o 2 Leonard Tachner PLC 17961 Sky Park Circle, Suite 38-E 3 Irvine, CA 92614-6364 4 5 Case: James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. 6 Date of deposition: October 12, 2012 Deponent: David J. Franklyn 7 8 Please be advised that the transcript in the above 9 referenced matter is now complete and ready for signature. 10 The deponent may come to this office to sign the transcript, 11 a copy may be purchased for the witness to review and sign, or the deponent and/or counsel may waive the option of signing. 12 Please advise us of the option selected. Please forward the errata sheet and the original signed 13 signature page to counsel noticing the deposition, noting the applicable 14 time period allowed for such by the governing Rules of Procedure. 15 If you have any questions, please do not hesitate to call our office at 16 (202)-232-0646. 17 18 Sincerely, 19 20 Digital Evidence Group 21 Copyright 2012 Digital Evidence Group 22 Copying is forbidden, including electronically, absent express written consent. Page 155</div></div>	<div><div>1 Digital Evidence Group, L.L.C. 2 1726 M Street NW, Suite 1010 3 Washington, D.C. 20036 4 (202) 232-0646 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</div><div><div>ERRATA SHEET  Case: James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc Witness Name: David J. Franklyn Deposition Date: October 12, 2012 Page No. Line No. Change  Signature Date Page 157</div></div></div>

Pages 154 to 157

10/12/2012 James R. Glidewell Dental Ceramics, Inc. v. Keating Dental Arts, Inc. David J. Franklyn

Page 154

1 STATE OF CALIFORNIA )  
2 COUNTY OF LOS ANGELES ) SS.  
3

4 I, AUDRA E. CRAMER, CSR No. 9901, in and for the  
State of California, do hereby certify:

5 That, prior to being examined, the witness named  
in the foregoing deposition was by me duly sworn to  
6 testify the truth, the whole truth and nothing but the  
truth;

7 That said deposition was taken down by me in  
shorthand at the time and place therein named, and  
8 thereafter reduced to typewriting under my direction,  
and the same is a true, correct and complete transcript  
9 of said proceedings;

I further certify that I am not interested in the  
10 event of the action.

11 Witness my hand this 31st day of October,  
12 2012.  
13  
14

15  
16  
17 

18 Certified Shorthand  
19 Reporter for the  
20 State of California  
21  
22